

EDITOR'S NOTE

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85-5542-CFH
Status: GRANTED
PITAL CASE

Title: Alvin Bernard Ford, etc., Petitioner
v.
Louie L. Wainwright, Secretary, Florida Department
of Corrections

Court: United States Court of Appeals
for the Eleventh Circuit

cketed:
tober 1, 1985

Counsel for petitioner: Burr III, Richard H.

Counsel for respondent: Shearer, Joy B.

try	Date	Note	Proceedings and Orders
1	Aug 20 1985		Application for extension of time to file petition and order granting same until October 1, 1985 (Powell, August 20, 1985).
2	Oct 1 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 24 1985		Brief of respondent Wainwright, Sec., FL DOC in opposition filed.
5	Oct 24 1985		Appendix of respondent Wainwright, Sec., FL DOC filed.
6	Oct 31 1984		DISTRIBUTED. November 15, 1985
7	Oct 31 1985	G	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
8	Oct 31 1985	G	Motion of Office of the Capital Collateral Representative for the State of Florida, et al. for leave to file a brief as amici curiae filed.
9	Nov 7 1985		Opposition of respondent to motion of National Assn. of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
0	Nov 12 1985		Opposition of respondent to motion of Office of the Capital Collateral Rep., et al. for leave to file a brief as amici curiae filed.
1	Nov 7 1985	X	Reply brief of petitioner Alvin B. Ford, etc. filed.
3	Nov 18 1985		REDISTRIBUTED. November 27, 1985
5	Dec 2 1985		REDISTRIBUTED. December 6, 1985
6	Dec 9 1985		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae GRANTED.
7	Dec 9 1985		Motion of Office of the Capital Collateral Representative for the State of Florida, et al. for leave to file a brief as amici curiae GRANTED.
9	Dec 9 1985		Petition GRANTED.
1	Jan 7 1986		***** Order extending time to file brief of petitioner on the merits until January 30, 1986.
2	Jan 17 1986		Joint appendix filed.
3	Jan 28 1986		Brief of petitioner Alvin B. Ford, etc. filed.
4	Jan 30 1986	G	Motion of American Psychological Association, et al. for leave to file a brief as amici curiae filed.
6	Feb 4 1986		Logging received.
7	Jan 30 1986	G	Motion of Office of the Capital Collateral Representative, et al. for the State of Florida, et al.

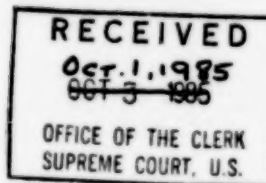
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try	Date	Note	Proceedings and Orders
8	Jan 30 1986	G	for leave to file a brief as amici curiae filed. Motion of American Psychiatric Association for leave to file a brief as amicus curiae filed.
9	Feb 24 1986		Motion of American Psychological Association, et al. for leave to file a brief as amici curiae GRANTED.
0	Feb 24 1986		Motion of Office of the Capital Collateral Representataive, et al. for the State of Florida, et al. for leave to file a brief as amici curiae GRANTED.
1	Feb 24 1986		Motion of American Psychiatric Association for leave to file a brief as amicus curiae GRANTED.
2	Feb 21 1986		Brief of respondent Mainwright, Sec., FL DOC filed.
3	Mar 5 1986		Record filed.
4	Mar 5 1986		Certified original record, 6 volumes, received.
5	Mar 14 1986		SET FOR ARGUMENT, Tuesday, April 22, 1986. (4th case)
6	Mar 14 1986		CIRCULATED.
7	Apr 10 1986	X	Repl brief of petitioner Alvin B. Ford, etc. filed.
8	Apr 22 1986		ARGUED.

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No. 85-5542



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

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ALVIN BERNARD FORD, OR CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent.

=====

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 PP

QUESTION PRESENTED

Whether the Eighth and Fourteenth Amendments permit the states to execute a person who appears to be mentally incompetent without having first determined his competency through a reliable and accurate factfinding procedure?

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OCTOBER TERM 1984

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ALVIN BERNARD FORD, OR CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent.

=====

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, ALVIN BERNARD FORD, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed January 17, 1985, upon which rehearing was denied on June 3, 1985.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 752 P.2d 526 (11th Cir. 1985), and is set out at pages 1a-10a of the Appendix.¹ The order denying rehearing is set out at App. 11a.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on January 17, 1985, and petitioner's timely petition for rehearing was denied on June 3, 1985. Thereafter, this Court entered an order extending the time within which the petition for writ of certiorari could be filed to and including October 1, 1985. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

¹ Citations to the Appendix accompanying this petition are designated App. ____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law....

It also involves Section 922.07, Florida Statutes (1983), which is set out at App. 12a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Alvin Bernard Ford is under sentence of death in the State of Florida. The validity of his conviction and death sentence has previously been litigated, see Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 201 (1983), and is no longer in issue. The present proceedings are concerned solely with the constitutionality of Florida's effort to execute Mr. Ford despite the substantial evidence of his present insanity.

On October 20, 1983, counsel for Mr. Ford invoked the procedures of Fla. Stat. § 922.07 (1983), relating to the competency of a condemned inmate. Pursuant to this statute, the Florida governor appointed a commission of three psychiatrists to evaluate Mr. Ford's current sanity. The commission members each reported their findings to the governor in writing, and without further proceedings, on April 30, 1984 the governor signed a Death Warrant for Mr. Ford.

On May 21, 1984, Mr. Ford's attorneys filed in the state trial court a Motion for a Hearing and Appointment of Experts for Determination of Competency to be Executed, and for a Stay of Execution During the Pendency Thereof, together with a supporting memorandum of law and an extensive appendix containing documentation of Mr. Ford's incompetency. The trial court denied the

motion without a hearing and without findings. On appeal, the Florida Supreme Court also denied relief, holding that there is no judicial review in Florida of the governor's determination of competency to be executed. Ford v. State, 451 So.2d 471, 475 (Fla. 1984). App. 13a-17a.

Thereafter, counsel for Mr. Ford filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, claiming inter alia that the Constitution prohibited his execution if presently insane and accordingly, entitled him to a determination of his present sanity in an evidentiary hearing. On May 29, 1984, the District Court denied the petition without a hearing, holding in the alternative that it constituted abuse of the writ, and that Florida's compliance with § 922.07 adequately protected Mr. Ford's constitutional right, if any, not to be executed when insane. App. 18a-30a.

On May 30, 1984, the Court of Appeals granted a certificate of probable cause and stayed Mr. Ford's execution. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). App. 31a-38a. This Court thereafter denied respondent's motion to vacate the stay, Wainwright v. Ford, ____ U.S. ____, 104 S.Ct. 3498 (1984). App. 39a-40a. Respondent Wainwright then filed a suggestion in the Court of Appeals that the appeal be heard initially en banc, because

the question of whether there is an Eighth Amendment right not to be executed while insane and if so, what procedures are required to satisfy it, is one of first impression. Its determination will affect capital litigation in this Circuit and nationwide.

Respondent's Suggestion of En Banc Consideration, August 23, 1984, at 7. Following argument before a panel, respondent's suggestion was noted to be moot, Ford v. Wainwright, 747 F.2d 1357 (11th Cir. 1984), and the panel thereafter affirmed the District Court's disposition of the merits of Mr. Ford's claim by a 2-1 vote. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). Rehearing en banc was denied.

B. Material Facts

In the two-year period following December, 1981, Alvin Ford's mental health gradually but pervasively deteriorated. By November, 1983, a psychiatrist confirmed prior opinion that Mr. Ford had become psychotic and found him incompetent to be executed. At that time Mr. Ford thought that he was on death row at Florida State Prison only because he chose to be there. He thought that the case of "Ford v. State" had ended capital punishment in Florida and, in particular, had deprived the State of Florida of the right to execute him. After November, 1983, his incapacity worsened. He lost the ability to communicate by conventional means. He could only mutter softly to himself, making gestures in which there seemed to be a message, but a message that no one could decipher. This was his condition at the time these proceedings began in May, 1984.

The process of Mr. Ford's deterioration to this condition began so gradually that at first it was almost imperceptible. Until late December or early January, 1982, he seemed to be in relatively good mental health. There were no symptoms, nor even precursors to the symptoms, of psychosis. Nor had there been during any of the time since Mr. Ford's arrest in 1974. Thus, no question of competency had been raised before, during, or after his trial. But gradually, from December, 1981 on, Mr. Ford lost touch with external reality.

The most obvious sign of Mr. Ford's loss of contact with reality has been his experience of delusions.² At first, in late 1981 and early 1982, Mr. Ford's delusions appeared as occasional peculiar ideas and misperceptions. App. 53a-56a. Gradually, however, delusions took over his entire conscious existence. The delusions eventually centered on his belief that

² A delusion is "[a] false personal belief based on incorrect inference about external reality and firmly sustained in spite of what almost everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 356 (Third Edition 1980). Delusional thinking is "[t]he major disturbance in the content of thought" that accompanies schizophrenia, *id.* at 181, and is thus, "[d]irect evidence of psychotic behavior....," *id.* at 367.

the Ku Klux Klan was holding his family and other people hostage in Florida State Prison in order to drive him to insanity and suicide. App. 72a-91a.³ As Mr. Ford's delusions took hold, some auditory and olfactory hallucinations began accompanying the delusions. See, e.g., App. 75a, 85-86a. By the summer of 1983, however, his delusions began to change. Mr. Ford somehow gained the power to free the hostages, to fire and prosecute the officers responsible, and to replace and add to the Justices of the Florida Supreme Court. App. 88a-92a. In this period, he also began to refer to himself as Pope John Paul III. Id. It was during this time that he began to say, for the first time, that the state could not execute him.

By November, 1983, Mr. Ford's communications became more fragmented. He was no longer centered on any particular subject, but would "carry on" about a multiplicity of subjects all in one uninterrupted breath. See, e.g., App. 93a-94a. An example of this behavior was recorded by Dr. Harold Kaufman, a psychiatrist who evaluated Mr. Ford on November 3, 1983 at the request of Mr. Ford's counsel:

Mr. Ford:

The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS...I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed...CBS is trying to do a movie about my case...I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch...there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me -- Sinatra, Hugh Hefner, people from the dog show, Richard Burr, my sisters and brother trying to sign the death warrants so they don't keep bothering me...I never see them, I only hear them especially at night. (Note that Mr. Ford denies seeing these people in his delusions. This suggests that he is honestly reporting what his mental processes are.) I won't be executed because of no crime...maybe because I'm a smart ass...my family's back there (in pipe alley)...you can't

³ The Klan undertook this campaign against Mr. Ford because he had found strong evidence, through his ability to perceive events occurring beyond the normal limits of perception, implicating the Klan in the arson of a house in Jacksonville in which a black family was killed. App. 56a-68a.

evaluate me. I did a study in the army...a lot of masturbation...I lost a lot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to -- Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other countries and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

App. 157a (Comments in parentheses are those of Dr. Kaufman).

In this same interview that Dr. Kaufman asked Mr. Ford, "Are you going to be executed?" Mr. Ford replied, "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over." App. 158a. Dr. Kaufman continued:

Dr. Kaufman (Q): Are you on death row?

Mr. Ford (A): Yes.

Q: Does that mean that the State intends to execute you?

A: No.

Q: Why not?

A: Because Ford v. State prevents it. They tried to get me with the FCC tape but when the KKK came in it was up to CBS and the Governor. These prisoners are rooming back there raping everybody. I told the Governor to sign the death warrants so they stop bothering me.

Id.

In December, 1983, communication with Mr. Ford became virtually impossible. In two interviews, on December 15 and December 19, he spoke in a fragmented, code-like fashion. At times during these interviews, Mr. Ford appeared to be trying to respond to questions posed to him, but he seemed incapable of communicating by any of the conventional methods with which people communicate. See App. 102a-107a.⁴

Four psychiatrists evaluated Mr. Ford's competency during this latter part of 1983: Dr. Harold Kaufman and the three psychiatrists appointed by the governor pursuant to Fla. Stat. §

⁴ The second of these interviews, on December 19, was the interview conducted by the psychiatrists appointed by Governor Graham pursuant to Fla. Stat. § 922.07.

922.07 (Drs. Peter Ivory, Umesh Mhatre, and Walter Afield). Dr. Kaufman, Dr. Mhatre, and Dr. Afield concluded that Mr. Ford suffered from psychosis. App. 158a, 164a, 166a. Dr. Kaufman further concluded that Mr. Ford's psychosis was of such severity "that he cannot sufficiently appreciate or understand either the reasons 'why the death penalty was imposed upon him' or 'the purpose' of this punishment." App. 159a. Despite their agreement with Dr. Kaufman concerning Mr. Ford's psychosis, Dr. Mhatre and Dr. Afield concluded nevertheless that Mr. Ford was competent.⁵

Substantial grounds were proffered to the District Court for believing that the opinions of the three psychiatrists appointed by the governor were based upon inadequate procedures. In preparation for the hearing which counsel for Mr. Ford anticipated in the state trial court, counsel asked two forensic psychiatrists, Dr. Seymour Halleck and Dr. George Barnard, both of whom are widely acclaimed within their field, to review the process by which Dr. Ivory, Dr. Mhatre, and Dr. Afield evaluated Mr. Ford. Dr. Halleck and Dr. Barnard concluded that the evaluations conducted by the three appointed psychiatrists were unreliable, and that they failed to measure up to the minimum standards for forensic evaluation. The reasons for this were the appointed psychiatrists' failure to consider much of the available data concerning Mr. Ford's mental status, their failure to document the factual basis for their conclusions concerning competency in the face of pervasive data supporting the contrary conclusion of Dr. Kaufman, and the great likelihood that the inappropriate

⁵ Thus, only the third psychiatrist appointed by Governor Graham, Dr. Ivory, found Mr. Ford to be suffering from no genuine illness. As to the genuineness of Mr. Ford's illness, however, it should be noted that a fifth psychiatrist, Dr. Jamal Amin, also evaluated Mr. Ford. Dr. Amin evaluated Mr. Ford periodically during the course of his deterioration, from before December, 1981 through June, 1983. Dr. Amin concluded that Mr. Ford had developed a profound form of schizophrenia during this time and documented why Mr. Ford's illness was genuine. App. 153a-155a. Dr. Amin was not able to render an opinion concerning Mr. Ford's competency after June, 1983, however, because Mr. Ford refused to be interviewed thereafter by him.

conditions under which Mr. Ford was interviewed would produce insufficient data for reliable forensic evaluation. See App. 169a-173a, 187a-193a.

Even with these serious deficiencies, however, Dr. Mhatre and Dr. Afield found that Mr. Ford suffered from a psychotic illness. Dr. Mhatre observed that "without [appropriate anti-psychotic] medication [Mr. Ford] is likely to deteriorate further and may soon reach a point where he may not be competent for execution." App. 164a. In the months following Dr. Mhatre's observation, his prediction of further deterioration was strikingly confirmed.

On May 23, 1984, Dr. Kaufman attempted to interview Mr. Ford for two hours at Florida State Prison. He observed the following:

[Mr. Ford] appeared to have lost at least twenty (20) pounds since I had last examined him on November 3, 1983. He was neatly dressed and was wearing rubber shower sandals. He did not greet the four of us as we entered and sat down. He sat with his body immobile and his handcuffed hands in a prayerful position in front of his mouth. Occasionally he moved his hands, still in the praying mode, to each of us for no apparent reason. His lips were pursed intermittently, but his head moved little. His eyes were closed or fluttering most of the time, although he occasionally glanced at one or more of us. His hands and fingers appeared to be trembling. We took turns asking him questions, and little or no response was forthcoming. He began muttering to himself after about five minutes. These utterances were largely unintelligible. This is the overall picture of what took place for two hours.

App. 167a. These observations led Dr. Kaufman to conclude that "Mr. Ford's condition, severe paranoid schizophrenia, has seriously worsened, so that he now has only minimal contact with the events of the external world," and to reconfirm his opinion that Mr. Ford was incompetent to be executed. App. 168a.

These were the facts that were proffered in the District Court on May 29, 1984, in response to which the court -- like the governor and the state courts before it -- held no hearing.

C. How the federal question was presented and decided in the courts below

After exhausting state remedies, counsel for Mr. Ford filed the present federal habeas corpus petition presenting the question herein as shown in the Appendix, at pages 48a, 110a-111a. The District Court denied the petition with the following statement:

I find that there is an abuse of the writ throughout this matter. But reaching the merits as well I find no reason to grant the relief sought by the Petitioner. The Governor of this State acting under 922.07 the Court finds that he has acted properly, has followed the steps. Each of the three psychiatrists whom he appointed has found the Defendant sufficiently competent to be executed under the law and so on the merits, as well as on this issue, the petition must fail.

App. 27a-28a.

In his appeal to the Court of Appeals thereafter, Mr. Ford's counsel presented the question herein in the form of three issues:

1. Whether the eighth amendment's prohibition of cruel and unusual punishment forbids the execution of a condemned person who is incompetent at the time of execution?
2. If the eighth amendment does forbid the execution of the incompetent, whether a federal habeas court must hold an evidentiary hearing to determine the competency of such a person, where the only prior state determination of competency was made in an ex parte, non-judicial proceeding?
3. Whether a state-created entitlement not to be executed when incompetent can be withdrawn without due process of law?

Brief for Petitioner-Appellant, at 1. The Court of Appeals decided these issues as follows:

If the matter were being presented for the first time, Ford's contention might present considerable difficulty. The panel majority, however, feels that Ford's contention is foreclosed by binding authority. In Sollesbee v. Balkcom, 339 U.S. 9 (1950) the Supreme Court examined a Georgia procedure which was virtually identical to that now incorporated in the Florida statute. In the controlling portion of the opinion the Supreme Court held "We are unable to say that it offends due process for a state to deem its Governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors." Sollesbee v. Balkcom, 339 U.S. at 12, 70 S.Ct. at 458 (footnote omitted).

REASONS FOR GRANTING THE WRIT

THE EIGHTH AND FOURTEENTH AMENDMENTS CAN NO LONGER TOLERATE EXECUTION OF THE QUESTIONABLY COMPETENT WITHOUT A PRIOR DETERMINATION OF COMPETENCY THROUGH A RELIABLE PROCEDURE

A. Introduction

All of the states which have the death penalty agree that a condemned person cannot be executed if, at the time of execution, he or she is mentally incompetent. Among civilized people, this consensus is not new. For at least seven hundred years, the common law has forbidden execution of the presently incompetent as a "savage and inhuman" act⁶ and "a miserable spectacle ... of extreme inhumanity and cruelty,"⁷ that is "repugnant to the moral traditions of Western civilization."⁸

Notwithstanding the consensus of the states and the singular command of the common law from the middle ages to the present, the Court has never decided whether the Constitution prohibits the execution of a presently incompetent person. Nor has the Court decided, since the demise of the right-privilege distinction, whether a state-created entitlement to be spared from execution if incompetent gives rise to a federally-protected right to a fair and reliable determination of competency in a particular case.

Florida should not be allowed to take the life of Alvin Ford until these questions are answered, for Mr. Ford's case -- unlike any other post-Furman case -- presents these questions on the merits, without any serious question of abuse of the writ or other procedural bar,⁹ and upon a record that creates, at a

⁶ 4 W. Blackstone, Commentaries on the Laws of England 24 (1768).

⁷ E. Coke, Third Institute 6 (1644).

⁸ Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953).

⁹ Cf. Woodard v. Hutchins, ___ U.S. ___, 104 S.Ct. 752 (1984); Goode v. Walnwright, 731 F.2d 1482 (11th Cir.), cert. den., ___ U.S. ___, 104 S.Ct. 1721 (1984). In contrast to these cases, in its opinion staying Mr. Ford's execution, the Court of Appeals found, after extensive discussion, "no evidence in the record to suggest that the incompetency issue was

minimum, substantial doubt about his present competency that has not been resolved satisfactorily through the summary proceedings before the governor and the lower courts, and that cannot be resolved satisfactorily without a hearing.¹⁰

Throughout the proceedings in the courts below, the State of Florida has sought to avoid decision of these questions by arguing alternatively that Solesbee v. Balkcom, 339 U.S. 9 (1950), has already decided the questions, and in any event, that Florida is not about to execute an incompetent person, because the governor of Florida has found Mr. Ford to be competent. Thus far, the State's strategy has worked, for no court -- state or federal -- has decided the questions through a considered analysis of the merits.

Such reasoning must not be allowed to dissuade the Court from deciding these difficult, unanswered questions. The Court has already declared unequivocally in Mr. Ford's case, in refusing to dissolve the stay of execution previously ordered by the Court of Appeals, that "[t]his Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane...." 104 S.Ct. at 3498 n.* (emphasis supplied). Since the Court made this statement in the face of the State's argument that Solesbee was controlling, see

available in December of 1981 when Ford's first [federal habeas] petition was filed...." 734 F.2d at 539. Indeed the process of Mr. Ford's deterioration only began in December of 1981. Because that process was gradual, the question of competency did not even begin to arise until late 1982 or 1983. Since Mr. Ford's appeals from the District Court's denial of his first petition were pending from December 10, 1981 through October 3, 1983, the Court of Appeals concluded that Mr. Ford had not abused the writ by failing to file a second petition while the appeals from the first petition were still pending. 734 F.2d at 540 & n.1. Further, the Court indicated that if the law "might and should evolve to impose such a duty, we would not be inclined to [find abuse of the writ] without the benefit of an evidentiary hearing to give Ford and his counsel an opportunity to explain their actions [,]... [which] would fall more clearly under Rule 9(a) of the Rules governing § 2254 cases" 734 F.2d at 540 n.1. On appeal, the panel did not readdress this matter, simply noting that, "The summary holding of abuse of the writ on the insanity issue is troublesome under the facts presented. In light of our resolution of the merits of this issue, however, it is not necessary that we reach the question." 752 F.2d at 527 n.1.

¹⁰ Cf. Gray v. Lucas, 710 F.2d 1046 (5th Cir.), cert. den., ___ U.S. ___, 104 S.Ct. 211 (1983).

Application of the State of Florida to Vacate Order of Eleventh Circuit Granting Stay of Execution, and Supplement thereto, at 6-9 and 5-6 respectively, May 31, 1984 (No. A-980), the Court plainly considered whether Solesbee controls and decided that it does not. And, whether Florida is about to execute an incompetent person cannot be answered simply by saying that the governor has found Mr. Ford competent. Whether that finding rests upon procedures consistent with the Constitution is the very question that this Court is being asked to address in Mr. Ford's case.

As we demonstrate, this issue should be addressed in Mr. Ford's case. The time is right, because

*** executions are now occurring with sufficient frequency that the issue will continue to arise until it is decided by the Court;¹¹ and

*** constitutional principles have evolved over the past two decades that now forbid the questionably competent to be executed solely upon the whim of the state executive, but without guidance from this Court the lower courts may well decide to avoid the analysis required by that doctrinal evolution -- as the Eleventh Circuit did in Mr. Ford's case -- through misplaced adherence to Solesbee v. Balkcom.

Further, Mr. Ford's case is the right case in which to review this issue. No case could demonstrate any better the need for the reliable factfinding procedure that the Eighth and Fourteenth Amendments would require in the determination of competency to be executed. Only that procedure -- not the ex parte procedure of determining competency wholly on the basis of three psychiatrists' written reports, as now utilized by Florida -- can assure accuracy in the determination of competency in a case like Mr. Ford's, for in his case

*** four of the five psychiatrists who have evaluated him have concluded that he suffers from a severe psychotic illness;

¹¹ This is not to say, however, that a determination by the Court would encourage frivolous assertions of incompetency. See p. 32 & n. 26, infra. The current record in Florida has established that it would not. And even if it did, the courts are well-equipped to identify and dispose of such claims quickly and efficiently. Id.

*** among these five psychiatrists, four have also rendered opinions about Mr. Ford's competency, and these opinions are in sharp conflict;

*** one of these psychiatrists has concluded that Mr. Ford is incompetent to be executed, and in comparison to the other psychiatrists who have addressed the competency issue, has spent substantially more time interviewing Mr. Ford in an appropriate setting, has more thoroughly reviewed his history, and has fully explained and documented the relation between Mr. Ford's psychosis and his competency to be executed;

*** in contrast, the three psychiatrists who have concluded that Mr. Ford is competent have interviewed him perfunctorily in a setting not conducive to reliable mental status evaluation; and one of these three has failed as well to consider most of the available historical and symptomatic data necessary to evaluate Mr. Ford, while the other two have failed altogether to explain why, in light of their conclusions that Mr. Ford is psychotic, they nonetheless believe that he is competent; and

*** nationally-recognized experts in forensic psychiatry have concluded that the manner in which these three psychiatrists evaluated Mr. Ford's competence to be executed was not likely to produce reliable conclusions, because of these deficiencies in their examination procedures and reasoning.

If the Eighth Amendment prohibits execution of the incompetent, or if the Fourteenth Amendment requires procedural safeguards in the determination of competency under a state law prohibition against execution of the incompetent, the Constitution cannot tolerate the resolution of Mr. Ford's competency -- on these facts -- by a procedure which has allowed no opportunity for Mr. Ford's counsel to prove, as these facts so clearly suggest, that Mr. Ford is incompetent.

B. Solesbee v. Balkcom did not decide whether the Constitution prohibits execution of the incompetent, but modern Eighth Amendment jurisprudence requires that this issue be decided

The Court of Appeals held that Mr. Ford's claim that the Eighth Amendment prohibits the execution of the presently incompetent had already been decided in Solesbee v. Balkcom, which held that a Georgia procedure similar to Fla. Stat. § 922.07 does not "offend[] due process...", 339 U.S. at 12. Ford v. Wainwright, 752 F.2d at 528. In so disposing of Mr. Ford's

Eighth Amendment claim, the Court of Appeals fundamentally confused and intermingled the due process analysis of Solesbee with the Eighth Amendment analysis required by Mr. Ford's claim.

In plain terms, Solesbee did not decide whether the Constitution substantively prohibited the execution of the presently incompetent; it decided only whether the Due Process Clause of the Fourteenth Amendment, as then interpreted, was offended by "the method applied by Georgia here to determine the sanity of an already convicted defendant...." 339 U.S. at 11. The Court did not reach the substantive issue, because in 1950 the only constitutional limitation upon the states' power to punish was the Due Process Clause. The Eighth Amendment's prohibition against cruel and unusual punishment was not to be incorporated into the Due Process Clause for another twelve years. See Robinson v. California, 370 U.S. 660 (1962). And in 1950, the Due Process Clause guaranteed only the fundamental procedural rights attendant to trials of guilt or innocence, which were generally held to be unavailable in sentencing proceedings. See Williams v. New York, 337 U.S. 241, 245-46 (1949). Accordingly, the Solesbee Court held that the procedural rights guaranteed by the Due Process Clause were unavailable to challenge the manner in which sanity was determined after conviction and sentencing. 339 U.S. at 12.

That Solesbee, in 1950, did not decide the Eighth Amendment issue presented by counsel for Mr. Ford is even clearer when one examines the doctrinal evolution brought about by the incorporation of the Eighth Amendment into the Fourteenth Amendment. With that development, the Constitution for the first time began to limit the states' power to punish -- both as to sentencing procedures and as to sentences themselves. As a result, the Court has felt compelled to reconsider many of its earlier due process decisions, most frequently and notably with respect to the states' procedures for inflicting capital punishment. The Court has expressly recognized that its earlier precedents upholding state capital procedures against due process challenges require reconsideration and often a contrary result when the same

procedures are challenged under the Eighth Amendment. See, e.g., Gardner v. Florida, 430 U.S. 349, 355-58 (1977) (plurality opinion); id. at 363-64 (White, J., concurring); Lockett v. Ohio, 438 U.S. 586, 597-99 (1978) (plurality opinion of Burger, C.J.) ("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in McGautha [v. California], 402 U.S. 183 (1971)] became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in Furman [v. Georgia], 408 U.S. 238 (1972)]"). The reason for this is that under the Eighth Amendment there must be greater reliability "in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), than due process requires generally for determinations in criminal cases. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra; Gardner v. Florida, supra.¹² Accord, Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985). Hence, procedures that otherwise comport with the Fourteenth Amendment have been held not to satisfy the Eighth Amendment's requirement of enhanced reliability. See, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442 U.S. 95 (1979); Gardner v. Florida, supra.

For these reasons, until the Court of Appeals rendered its anomalous decision in Mr. Ford's case, every lower federal court confronted with the same issue had held, as the Eleventh Circuit itself had in Goode v. Wainwright, that "[t]here has been no conclusive determination whether there is such a constitutional entitlement [not to be executed if incompetent] under federal law." 731 F.2d at 1483 (citing Gray v. Lucas, 710 F.2d at 1053-54). Accord Ford v. Strickland, 734 F.2d at 539 (granting stay of execution). Thus, when Justice Powell wrote for the plurality, in upholding Mr. Ford's stay, that "[t]his Court has

¹² See also Barefoot v. Estelle, 463 U.S. 880, 924 (1983) (Blackmun, J., dissenting); Eddings v. Oklahoma, 455 U.S. at 118 (O'Connor, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 443 (1980) (Burger, C.J., dissenting).

never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane," Wainwright v. Ford, 104 S.Ct. at 3498, he was demonstrably correct.

Because of its mistaken deference to Solesbee, the majority of the panel in the Court of Appeals refused to consider the merits of the Eighth Amendment question presented by counsel for Mr. Ford. The panel majority did recognize, however, that "[i]f the matter were being presented for the first time, Ford's contention might present considerable difficulty." 752 F.2d at 528. The reason that the Court of Appeals majority was so troubled about the merits of Mr. Ford's claim -- and the reason that this Court should decide to review his claim -- is that the principles of Eighth Amendment jurisprudence provide powerful support for the claim that the Constitution prohibits execution of the incompetent.

First, the original intent of the Framers of the Bill of Rights in prohibiting "cruel and unusual punishments" was "to provide at least the same protection [to United States citizens] -- including the right to be free from excessive punishments," Solem v. Helm, ___ U.S. ___, 103 S.Ct. 3001, 3007 (1983), as had been accorded English subjects. See also Furman v. Georgia, 408 U.S. 238, 264 (1972) (Brennan, J., concurring) (summarizing the Court's early Eighth Amendment decisions as "concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted"); McGautha v. California, 402 U.S. 183, 226 (1971) (Black, J., concurring) (same). Accord, T. Cooley, A Treatise on Constitutional Limitations, 472-73 (7th ed. 1903). At the time the Bill of Rights was framed, the execution of the incompetent had been strictly forbidden in England for at least five hundred years as "savage and inhuman" and "a miserable spectacle ... of extreme inhumanity and cruelty." See, e.g., 2 J. Stephen, A History of the Criminal Law of England 151 (1883) (tracing the treatment of insanity from the mid-thirteenth century); FitzHerbert, Natura Brevium 202 (1534) (quoted in Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1931-32)); E. Coke, Third

Institute 6 (1644); 1 M. Hale, The History of the Pleas of the Crown 35 (1736); 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768).¹³ Accordingly, even under the most restrictive reading of the Eighth Amendment -- that it was intended to prohibit only those punishments forbidden as cruel and unusual under English law at the time the Bill of Rights was enacted -- there is no doubt that it proscribed as "cruel and unusual" the execution of the incompetent. It would require blinders to history to hold otherwise.

Moreover, there is absolutely no indication that the Framers intended the execution of the incompetent to be excepted from the punishments deemed cruel and unusual at the time the Eighth Amendment was adopted. To reach this conclusion, one would have to assume that the Framers intended "American law [to be] more brutal than what is revealed as the unbroken command of English law for centuries preceding the separation of the Colonies." Solesbee v. Balkcom, 339 U.S. at 20 (Frankfurter, J., dissenting). As to the execution of the incompetent particularly, there is no basis for such an assumption. See, e.g., 1 J. Chitty, A Practical Treatise on the Criminal Law 620 (Amer. ed. 1819) (carrying forward the proscription on execution of the incompetent, noting that it "was always thought cruel and inhuman"); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 15 (3d Amer. ed. 1836)(same); F. Wharton, A Treatise on the Criminal Law of the United States 50 (2d ed. 1852) (same).

¹³ Even though the prohibition against executing the incompetent was so entrenched in English law, some have mistakenly referred to it as falling within the prerogative of the Crown as an act of grace. This, however, is a misreading of common law history. Though as a technical matter, one who was incompetent was excused from execution only by a "reprieve," this kind of reprieve was not a matter of grace but a matter of right. As Blackstone explained, there were two types of reprieves, the first was the "arbitrary reprieve" ("ex arbitria judicis") which was discretionary and could be granted, as its name implies, for any or no reason. The second was "ex necessitate legis" which as its name implies, was mandatory. The stay of execution due to incompetence fell into this latter category. It was a reprieve as a matter of right -- an "invariable rule" -- and could be raised by the judge or "plead[ed] in bar of execution." Blackstone at 394-97.

Second, apart from the "intent of the Framers" analysis, the execution of the incompetent fails as well to pass constitutional muster under the "evolving standards of decency" analysis. Under the first part of this two-stage analysis, execution of the incompetent falls below "contemporary standards of decency" as measured by the objective indicia of such standards. See generally Enmund v. Florida, 458 U.S. 782, 788-89 (1982) (discussing the objective indicia of contemporary standards -- "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" -- that were considered in Coker v. Georgia, 433 U.S. 584, 592 (1977)). From the perspective of historical development, we have already shown that for seven hundred years the common law nations have prohibited execution of the incompetent. From the perspective of legislative judgments, all the states which have capital punishment forbid the execution of the incompetent.¹⁴ And finally, from the perspective of international opinion, the prohibition is just as uniform, as reported by members of the United Nations.¹⁵

Under the second part of contemporary Eighth Amendment analysis, in which the Court, "informed by [the foregoing] objective factors to the maximum possible extent," Coker v. Georgia, 433 U.S. at 592, "bring[s] its own judgment to bear on the matter," Enmund v. Florida, 458 U.S. at 788-89, execution of the incompetent should be determined as well to fall below "the basic concept of human dignity at the core of the [Eighth] Amendment," Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion). The very reason that such executions have been proscribed for seven centuries is that they offend the concept of human dignity: as already noted, history has condemned the execution of an incompetent person as a "savage and inhuman act"

¹⁴ See Ford v. Wainwright, 752 F.2d at 530-31 & n.2 (Clark, J., dissenting).

¹⁵ See Dept. of Econ. and Soc. Affairs, United Nations Doc. ST/SOA/SD/10, Capital Punishment: Developments 1961-1965 10 (1967); Dept. of Econ. and Soc. Affairs, United Nations Doc. ST/SOA/SD/9, Capital Punishment 15-16, 88 (1962).

and a "miserable spectacle ... of extreme inhumanity and cruelty," that is "repugnant to the moral traditions of Western civilization." It offends the most basic notions of fairness and decency to execute human beings in such a helpless condition -- unable to understand what is happening to them, to defend themselves as the law might still allow, to prepare for imminent death or to make peace with their God.¹⁶

Further, execution of the incompetent interferes with the condemned's right of access to collateral remedies -- a right of "fundamental importance ... in our constitutional scheme," Johnson v. Avery, 393 U.S. 483, 485 (1969). Just as a person must be competent in order to make the myriad of decisions, voluntarily and intelligently, that must be made at trial, a person must be competent in order to exercise meaningfully his right of access to collateral remedies. Unlike appeals, which concern claims already litigated, collateral proceedings are "original actions seeking new trials ... frequently rais[ing] heretofore unlitigated issues ...," Bounds v. Smith, 430 U.S. 817, 827-28 (1977), and, like trials, require voluntary and intelligent decision-making by the petitioner. See Shriner v. Wainwright, 735 F.2d 1236, 1240-41 (11th Cir.), cert. denied,

¹⁶ A number of logical explanations have been advanced over the years to explain the prohibition against execution of the insane, some of which have been the subject of debate over their efficacy. See, e.g., Hazard and Louisell, Death, The State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 383-89 (1962). This debate, however, is quite beside the point, for regardless of the explanation it remains that execution of the insane has been prohibited and disapproved as savage, cruel and inhuman for centuries. "The more fundamental the beliefs [of a civilized society] are the less likely they are to be explicitly stated." Solesbee v. Balkcom, 339 U.S. at 16 (Frankfurter, J., dissenting). The "miserable spectacle" of execution of the insane is an act that thus strikes to the essence of basic human dignity:

Such doctrines have been preached and practiced in National Socialist Germany, but they are repugnant to the moral traditions of Western civilization and we are confident that they would be unhesitatingly rejected by the great majority of the population of this country. We assume the continuance of the ancient and humane principle that has long formed part of our common law.

Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953) (emphasis supplied).

___U.S.___, 82 L.Ed.2d 852 (1984) (a habeas corpus petitioner will be held to have waived his right to present facts and claims if he personally fails to assert such facts and claims as were known to him at the time of the habeas corpus proceeding, upon counsel's negligent or deliberate failure to assert such facts and claims).

Finally, execution of the incompetent does not measurably contribute to the penological justifications for capital sentencing: retribution and deterrence. Retribution is ill-served by the execution of the incompetent, for if it is meant to impress a moral lesson on the offender, the condemned person, by reason of his incompetence, cannot be brought by that specter to feel the respect for the law and society that a competent person should feel. If it is intended instead to act as a release or an "expression of society's moral outrage," Gregg, 428 U.S. at 183, then execution of the incompetent fails in that goal or even counteracts it. Under this theory of retribution, each wrong must be offset by a punitive act of the same quality. But when the prisoner is incompetent, a punishment of lesser value is being imposed. Accordingly, "the social goal of institutionalized retribution may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance". Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454, 458-59 (1967).¹⁷

For similar reasons, deterrence of others is not served by execution of the incompetent. Lord Coke wrote centuries ago that executing an incompetent person "can be no example to others." Third Institute, at 6. This is so because "prospective offenders" of capital crimes, Gregg, 428 U.S. at 183, cannot identify with an incompetent person who is executed. See also Collinson, A Treatise on Law Concerning Idiots, Lunatics, and Other Persons Non Compos Mentis 472 (1812). Moreover, whatever the overall

¹⁷ This retributive theory -- that the prisoner must know what is happening to him in order to satisfy the public need for vengeance -- may seem "unappealing to many, but," as the Court has said, "it is essential in an ordered society." Gregg, 428 U.S. at 183.

deterrent effect of the death penalty is itself, it would not be weakened by the withholding of it for those relatively few prisoners who become incompetent.

- C. The evolution of Due Process jurisprudence since *Sollesbee* requires that the Court reconsider whether a state-created entitlement to be spared from execution if incompetent gives rise to a federally-protected right to a fair and reliable determination of competency in a particular case.

Apart from his claim that the Eighth Amendment substantively prohibits the execution of the insane, Mr. Ford's counsel also argued in the courts below that the procedural due process protections of the Fourteenth Amendment are triggered by Florida's state-created right to be spared from execution when insane, but that Florida's procedure for determining the competence of a condemned person at the time of execution, pursuant to Fla. Stat. § 922.07, fails to afford the protections required by the Fourteenth Amendment. Even though *Sollesbee* decided this procedural due process issue, the principles underlying its analysis have evolved to such an extent in the intervening decades, that we submit it is no longer of precedential value. Because of this, we urge the Court to reconsider the applicability of the Due Process Clause to the states' procedures for determining whether a condemned person is incompetent and thus entitled to be spared from execution under a state-created prohibition against executing the incompetent.

Since the decision in *Sollesbee*, three significant evolutionary developments in due process jurisprudence have effectively overruled *Sollesbee* as controlling precedent.

First, *Sollesbee* was decided at a time when the procedural protections of the Due Process Clause were applicable only to "rights," not "privileges." See, e.g., *Ughbanks v. Armstrong*, 208 U.S. 481 (1908); *Escoe v. Zebst*, 295 U.S. 490 (1935); *Phyle v. Duffy*, 34 Cal. 2d 144, 208 P.2d 668, 677-78 (1949) (Traynor, J., concurring in judgment). The classification of a particular interest as a right or a privilege turned critically upon the procedure which had been used historically to protect the interest. See *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974)

(Powell, J., joined by Blackmun, J., concurring in part); id. at 210-11 & n. 7 (Marshall, J., joined by Brennan and Douglas, J.J., dissenting); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). There is no better example of the operation of these principles than the Court's analysis in Solesbee, which relegated the interest of a condemned person in being spared from execution if incompetent to the status of a privilege, solely because of the procedure which the Court found to have been used historically to determine the competency of a person at the time of execution:

The heart of the common-law doctrine has been that a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence.

339 U.S. at 13.¹⁸

Since Solesbee, the Court has firmly discarded "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege,'" Graham v. Richardson, 403 U.S. 365, 374 (1971). See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970). Rather than examining the historical procedural protection accorded a particular interest, the post-right/privilege analysis focuses upon the "'objective expectation [of the individual], firmly fixed in state law and official ... practice,'" Vitek v. Jones, 445 U.S. 480, 489 (1980). If the individual has a "justifiable expectation," id., that the state will not arbitrarily withdraw a benefit conferred or withhold a benefit expected to be conferred, due process protects that individual's interest against "arbitrary disregard ...," Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). In the post-right/privilege era of analysis, therefore, the Court has increasingly embraced the concept that

¹⁸ Even here, however, it should be noted that Solesbee Court's reliance upon the procedure by which the condemned's interest had historically been protected was misplaced. As we have demonstrated in footnote 13, supra, the suggestion of insanity after sentence historically was not an appeal to discretion but an appeal to enforce an absolute right.

state-created substantive rights do enjoy the procedural protection of the Due Process Clause, because of the "justifiable expectation" that such rights will not be withdrawn arbitrarily.

While there has been no application of the state-created rights analysis to the interest of a condemned person in being spared from execution if incompetent, the analysis has been applied to two related interests -- parole and probation. Under the right/privilege analysis, these interests were seen as identical to the interest of the condemned in being spared from execution if incompetent: each had previously been classified only as "privileges," which the state could grant or revoke wholly within its discretion because each "comes as an act of grace to one convicted of crime." Escoe v. Zerbst, 295 U.S. at 492; Ughbanks v. Armstrong, *supra*. See Solesbee v. Balkcom, 339 U.S. at 11 ("[p]ostponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general"). Despite this view, the Court has since held -- under the state-created rights analysis -- that the states could nonetheless create entitlements to parole and probation that were protected by due process. Such an entitlement was first found in connection with the interest of a parolee in not having his parole arbitrarily revoked, Morrissey v. Brewer, 408 U.S. at 481-82, then applied to the revocation of probation, Gagnon v. Scarpelli, 411 U.S. 778, 782 & n.4 (1973), and finally, to the initial grant of parole, Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979).

Since the application of the state-created rights analysis has produced these results with respect to probation and parole, the application of this analytical method to the interest of the condemned in being spared from execution when incompetent should produce the same results in a state like Florida, for Florida has created a "justifiable expectation" that a condemned person will not be executed when incompetent by its unconditional prohibition of the execution of the incompetent for more than sixty years.

See, e.g., Ex parte Chesser, 93 Fla. 590, 112 So. 87, 89 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939); Ford v. Wainwright, 451 So.2d at 475.

Finally, two remaining post-Solesbee developments in due process jurisprudence confirm the necessity of evaluating anew the applicability of the Due Process Clause to the determination of execution competency. These two developments have thoroughly undermined Williams v. New York, *supra*, upon which the Solesbee Court relied to hold that the Due Process Clause did not protect the interest of the condemned in competency at the time of execution. Solesbee, 339 U.S. at 12. These developments were noted succinctly in Gardner v. Florida.

First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country.... [Citations omitted.] ... It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause....

430 U.S. at 357-58 (footnotes omitted). Because Solesbee was significantly the product of Williams v. New York, Solesbee has effectively been overruled to the same extent as Williams -- by the subsequent jurisprudential developments which led to the application of the Due Process Clause to sentencing proceedings and to the requirement of particularly stringent due process protections in sentencing proceedings that involve the death penalty.

Mr. Ford recognizes that the heightened due process protections which the Court began to require in capital sentencing proceedings in the decade of the 1970's were developed to assure reliability in the decision to impose death, not the decision to carry out an already-imposed (and otherwise legally proper) death sentence. However, the rationale for heightened due process in the sentence imposition proceeding is equally compelling in a proceeding to determine whether to carry out a death sentence

against a person who appears to be incompetent. Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," Woodson v. North Carolina, 428 U.S. at 305, there must be correspondingly greater reliability in the "determination that death is the appropriate punishment in a specific case." Id. The "qualitatively different" character of a death sentence requires as well that the determination of competency at execution be reliable, even if all the safeguards attendant to the initial sentencing decision are not required. As Justice Frankfurter recognized in his dissent in Solesbee, "Since it does not go to the question of guilt [19] but to its consequences, the determination of the issue of insanity after sentence does not require the safeguards of a judicial proceeding." 339 U.S. at 24. However, the inquiry into competency nevertheless

must be fair in relation to the issue for determination. In the present state of tentative and dubious knowledge as to mental diseases and the great strife of schools in regard to them, it surely operates unfairly to make such determinations not only behind closed doors but without any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance.

Id. at 24-25. Echoing these strains in dissent in Mr. Ford's case, Judge Clark brought the need for "fair[ness] in relation to the issue for determination" into post-Furman perspective:

Admittedly, we are not reviewing here the question of whether death is the appropriate punishment for Mr. Ford and the procedures used to make that decision. Nevertheless, the procedures used to determine whether the death penalty is a permissible punishment for him at this time is being reviewed. The reliability required for capital decisions is still relevant and adequate procedures to determine the present death eligibility are still required.

752 F.2d at 533 (emphasis in original).

For these reasons, Mr. Ford urges the Court to reconsider the question decided thirty-five years ago in Solesbee.²⁰

¹⁹ And, we should now add (in light of post-Furman jurisprudence), to the question of the propriety of the sentence.

²⁰ The request he makes is just as compelling as the request recently made by the petitioner in Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087 (1985), where the Court reconsidered another Solesbee-era due process decision, United States ex

- D. The ex parte, non-adversarial, non-record procedure by which the Florida Governor determines competency fails to satisfy the minimum constitutional standards necessary to safeguard the reliability, fairness and accuracy of the competency-determination process.

Under either constitutional theory discussed in the preceding two sections, Florida's procedure for determining competency fails to protect the constitutional interests at stake. At bottom, these interests require that there be a reliable fact-finding procedure for determining the facts of competency. And in this respect, the Florida procedure is an utter failure.

1. Florida's ex parte, non-adversarial procedure

By statute, Florida has created an administrative proceeding for the governor to examine a death-sentenced individual's competency to be executed. Fla. Stat. § 922.097 (1983). In Mr. Ford's case, for the first time, the Supreme Court of Florida held that "the statutory procedure is now the exclusive procedure for determining competency to be executed." Ford v. Wainwright, 451 So.2d at 475.²¹

rel. Smith v. Baldi, 344 U.S. 561, 568 (1953), because of the erosion of the jurisprudential basis of that decision by subsequent developments. The Court explained that its decision to reconsider Smith was primarily the result of the evolution since Smith of "elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to receive a fair hearing," as well as "the extraordinarily enhanced role of psychiatry in criminal law today." 105 S.Ct. at 1098. The evolution of the "elemental constitutional rights" referred to in Ake is not precisely the evolution that requires reconsideration of the issue previously decided in Solesbee. However, the evolution of the Due Process Clause in the three respects just discussed is parallel to -- and just as significant as -- the evolution that led the Court to reconsider the issue previously decided in Smith.

²¹ The Florida Court had previously held, prior to the enactment of the statute, that there was a right to a judicial determination by the trial judge where a condemned person was alleged to be incompetent. Ex parte Chessner, 93 Fla. 291, 111 So. 720 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939). The court had not had an opportunity to address the effect of § 922.07 on this right, however, until 1984, in Mr. Ford's case and in Goode v. Wainwright, 448 So.2d 999 (Fla. 1984). In Goode, decided one month before Mr. Ford's case, the court appeared to leave open the prospect of judicial proceedings for the determination of execution competency. See Goode v. Wainwright, 731 F.2d at 1483 ("he was free to assert this contention in state and federal courts from the time that he was sentenced to death" (emphasis supplied)).

This procedure is ex parte within the executive branch. When the governor is informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person "to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." § 922.07(1). The examination is to take place with all three psychiatrists present at the same time. Defense counsel and the prosecutor "may be present at the examination." And if the convicted person has no counsel, the trial court "shall appoint counsel to represent him." Id.

Though provision is made for appointment of counsel, no provision is made for a hearing or other adversarial activity by counsel on behalf of her client. Consistent with these provisions, the present Florida governor has a "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under sentence of death is insane." Goode v. Wainwright, 448 So.2d at 1001 (emphasis supplied).²² After receiving the report, if the governor "decides" that the convicted person does not meet the competency test set out in the statute, then he orders the person committed to the state hospital. If he "decides" that he meets the test, then the governor issues a death warrant ordering execution. §§ 922.07(2), (3). There are no written findings and there is no judicial review of the decision.

2. Florida's statutory competency-determination procedure fails to provide the reliable fact-finding procedure required by the Constitution's prohibition against execution of the incompetent.

Under Mr. Ford's theory that the Eighth Amendment prohibits execution of the incompetent, the writ of habeas corpus provides a remedy for the enforcement of this guarantee. However, the decision to issue or deny the writ must be made upon reliable and accurate fact-finding. And as we demonstrate, Florida's § 922.07

²² Thus, as in Solesbee, the Florida Governor makes the competency determination "not only behind closed doors but without any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance." 339 U.S. at 25 (Frankfurter, J., dissenting).

procedure -- without more -- cannot provide the kind of accurate and reliable fact-findings upon which a federal habeas court can decide whether the writ should issue.

In order to vindicate federal rights, habeas corpus depends critically upon accurate and reliable fact-finding. If the facts have been reliably found by the state courts on the basis of a full hearing, the federal habeas court need not hold a new fact-finding proceeding. However, if there has been no such fact-finding by the state courts, the federal habeas court must hold a de novo evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 312 (1963). If Mr. Ford's claim that the Eighth Amendment prohibits the execution of the incompetent is well-taken, the federal habeas court must, therefore, hold an evidentiary hearing to determine the factual questions underlying his competency, "unless the state-court trier of fact has after a full hearing reliably found the facts." Id. at 312.²³

As we have shown, in Mr. Ford's case neither the governor, the state courts, nor the District Court held an evidentiary hearing. There was only an ex parte § 922.07 proceeding. And even if a non-judicial state trier of fact could make reliable fact-findings, the governor acting under § 922.07 cannot.²⁴ The § 922.07 proceeding in Mr. Ford's case was woefully inadequate when measured against the Townsend standard. As just noted, the fact-finder was not a court; moreover, there was no hearing, much less a full and fair hearing, to serve as a basis for fact-finding; and there were no findings of fact, except for those implied in the finding that Mr. Ford was competent by virtue of his death warrant having been signed. Finally, there was no

²³ As the Court made clear in Maggio v. Fulford, 462 U.S. 116 (1983), resolution of the facts underlying a competency claim may, like any other factual matter, be determined in the state courts.

²⁴ Townsend, as well as its statutory counterpart, 28 U.S.C. § 2254 (d), have always required a court to find the facts in order to assure the reliability of the fact-finding process.

judicial review of the governor's implied fact-finding or his fact-finding procedure; nor can there be under the Florida Supreme Court's decision in Mr. Ford's case.²⁵

While these defects in the 922.07 proceeding, without further discussion, clearly compel a de novo hearing in the district court, it is worth emphasizing why this is so. The Townsend Court's requirement of fact-finding on the basis of a full and fair hearing -- as the only acceptable means of assuring reliable fact-finding -- is well-rooted in the Court's jurisprudence, both before and after the Townsend decision. The Court has long recognized that a hearing is necessary to provide the "adversarial debate our system recognizes as essential to the truth seeking function," Gardner v. Florida, 430 U.S. at 359, for "no better instrument has been devised for arriving at the truth," Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). See also Goss v. Lopez, 419 U.S. 565, 579 (1975); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Mullane v. Central Hanover Trust Co, 339 U.S. 306, 313 (1950).

There is no more compelling example of the crucial role of the hearing in the truth seeking function than in the resolution of mental health issues. As the Chief Justice has observed, "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." Addington v. Texas, 441 U.S. 418, 430 (1979). It is for this reason that juries or judges -- lay fact-finders -- retain the fact-finding role in determining mental health issues. But without a hearing, in which the experts explain their opinions, as well as the data and reasoning process upon which their opinions are based, lay fact-finders cannot make accurate, reliable determinations of mental health facts when the experts' opinions are in conflict. Although made in the context of explaining the crucial role of an

²⁵ Cf. Mattheson v. King, 751 P.2d 1432, 1447 (5th Cir. 1985) (deferring to state court's determination of competency following an evidentiary hearing, though not deciding whether the Constitution prohibits execution of the mentally incompetent).

expert in the process of resolving mental health issues, the Court's observations in Ake v. Oklahoma are equally insightful in explaining the crucial role of a hearing in the resolution of these issues.

Psychiatry is not ... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences of opinion within the psychiatric profession on the basis of the evidence offered by each party By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

105 S.Ct. at 1096. Without a hearing, however, the crucial process of experts "laying out their investigative and analytic process" to the factfinder -- in the cauldron of adversarial debate -- cannot occur, and the "most accurate determination of the truth" cannot be made.

Accordingly, because it provides for no full and fair hearing upon which the facts must be reliably found, the 922.07 procedure fails to provide the kind of fact-finding procedure necessary to determine whether the Eighth Amendment's prohibition against executing the incompetent applies in a particular case

3. Florida's statutory competency-determination procedure fails to provide the reliable fact-finding procedure required by the Constitution in the administration of the state-created right to be spared from execution if incompetent

With respect to the Fourteenth Amendment claim, once a state-created entitlement or substantive right is identified, the extent of procedural protection required by the Constitution must then be ascertained. Since "[a] procedural rule that may satisfy due process in one context may not satisfy procedural due process in every case," Bell v. Burson, 402 U.S. at 540, in order to determine the procedural safeguards that are due, the Court has employed a balancing process that weighs three factors:

the private interest that will be affected by the government action at issue, the public interest that will be affected if the safeguards are provided, and the probable effect such safeguards will have on reducing the risk of erroneous decisions. See Logan v. Zimmerman Brush Co., 455 U.S. at 434; Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978); Dixon v. Love, 431 U.S. 105, 112-15 (1977); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). See also Ake v. Oklahoma, 105 S.Ct. at 1094. When applied in the context of determining competency at the time of execution, these factors weigh in favor of requiring the state courts to provide the very same procedural safeguards in enforcing the state substantive right which they must provide if, in the context of the Eighth Amendment claim, their fact-findings are to be sufficiently reliable to avoid the need for a federal evidentiary hearing: a full and fair evidentiary hearing, on the basis of which the fact-finder reliably finds the relevant facts.

The private interest that is affected by a state's determination of competency at the time of execution is obvious and compelling: the right of a condemned person to have a final opportunity to assert matters known only to him which would make his execution unlawful or unjust, as well as the right to appreciate the meaning of, and to prepare for, the termination of his life. Just as compelling is the interest of the condemned that his competency be determined accurately, for only by accurate determination will the interests of the truly incompetent be protected. While the Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case," Ake v. Oklahoma, 105 S.Ct. at 1097, that interest clearly extends to the determination of competency at the time of execution.

The public interest has three aspects. The first two -- the interest in reducing the cost of criminal proceedings and the interest in avoiding undue delay in executions occasioned by frivolous claims of incompetence -- weigh against additional safeguards. The third -- the interest in sparing the truly

incompetent from execution -- weighs in favor of additional safeguards. With respect to costs, Florida already pays three psychiatrists to evaluate the condemned. The additional cost occasioned by a hearing should not be burdensome, and in any event, "does not justify denying a hearing meeting the ordinary standards of due process," Goldberg v. Kelly, 397 U.S. at 261. See also Bell v. Burson, 402 U.S. at 540-41. With respect to undue delay, the courts and the states are well-equipped, under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts and Rules 12 and 56 of the Rules of Civil Procedure, to dispose quickly and efficiently of frivolous claims. These or similar devices could be incorporated into state hearing procedures.²⁶ Where a claim of incompetency is not frivolous, as in Mr. Ford's case, "the time invested in ascertaining the truth will surely be well spent if it makes the difference between life and death." Gardner v. Florida, 430 U.S. at 360.

The interest of the public that will be affected most significantly by the safeguards is the same as the interest of the condemned: the interest in accurate determinations of competency, to avoid executing the truly incompetent. Accord Ake v. Oklahoma, 105 S.Ct. at 1094-95 ("[t]he State's interest in prevailing at trial ... is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases"). Moreover, when life and death are at issue, the Court's post-Furman jurisprudence demands that the interest in reliability and accuracy be given paramount importance. Id. at 1097 ("[t]he State ... has a profound interest in assuring that its ultimate

²⁶ However, the Court should take notice that there has not been -- nor is there any sign that there will be in the future -- a flood of frivolous claims of incompetence. Governor Graham has signed well over 100 death warrants in his six-and-one-half years in office, and in only four of the death warrant cases have claims of incompetence been asserted. Fears of frivolous claims and undue delay have been raised for centuries, but the courts have always been found capable of dealing with the "difference between pretenses and realities." Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 State Trials 474, 478 (1816). See also 1 M. Hale, The History of the Pleas of the Crown 35 (1736).

sanction is not erroneously imposed"). Accordingly, the public interest is very much in accord with Justice Frankfurter's expression of it in his Solesbee dissent:

It is a groundless fear to assume that it would obstruct the rigorous administration of criminal justice to allow the case to be put for a claim of insanity, however informal and expeditious the procedure for dealing with the claim. The time needed for such a fair procedure could not unreasonably delay the execution of the sentence unless in all fairness and with due respect for a basic principle in our law the execution should be delayed. The risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity, the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship.

339 U.S. at 25.

Finally, as we have already shown, a full and fair evidentiary hearing is the only procedural mechanism that assures the accurate determination of the truth of a claim of incompetence. Accordingly, the probable effect of such a safeguard is to reduce the risk of erroneous decisions. Without it "the risk of an inaccurate resolution of sanity issues is extremely high," Ake v. Oklahoma, 105 S.Ct. at 1096.

For these reasons, the Fourteenth Amendment demands that the states determine competency, under a state-created right to be spared from execution if incompetent, on the basis of a full and fair evidentiary hearing. Without this, the Constitution cannot tolerate the execution of one who appears to be incompetent.

E. Alvin Ford's competency cannot be reliably determined without an evidentiary hearing

Notwithstanding the preceding argument, there may be rare cases in which competency can be reliably determined without an evidentiary hearing. Where psychiatric and psychological opinion respecting competency is unanimous, a finding of competence or incompetence may well be reliable. But where opinions differ, no accurate resolution can be made in the absence of a hearing, where the competing views of competent professionals can be explained, and the more accurate view determined. This principle is at the heart of Ake v. Oklahoma, and it is also at the

heart of Mr. Ford's case. Indeed there can be no better example than Mr. Ford's case of the critical need for an evidentiary hearing.

In his case, psychiatric opinion was nearly uniform that he suffers from a severe form of psychosis.²⁷ However, the conclusions drawn concerning his competency, in light of that psychosis, were sharply conflicting. The psychiatrist who spent the most time interviewing Mr. Ford, under conditions conducive to reliable psychiatric assessment, and who most carefully reviewed Mr. Ford's history as well as the opinion of psychiatrists who had previously evaluated him, concluded that he is incompetent, because his psychotic delusional processes have fundamentally impaired his ability to understand why he is to be executed. The other psychiatrists who also concluded that Mr. Ford is psychotic, determined nevertheless, that Mr. Ford is competent. However, these psychiatrists offered no explanation as to how this conclusion could be squared with Mr. Ford's psychotic delusional processes. In the opinion of nationally-acclaimed experts in forensic psychiatry, the conclusions of this latter group of psychiatrists were, accordingly, unreliable -- precisely because they failed to account for the compelling data that linked Mr. Ford's delusional processes to incompetency. Upon analysis of these conflicting opinions, the Court will see quite clearly that the conflicts cannot be resolved accurately in the absence of a hearing, where the psychiatrists "organiz[e] [Mr. Ford's] mental history, examination results and behavior, and other information, interpret[] it in light of their expertise, and then lay[] out their investigative and analytic process to the [factfinder]" Ake v. Oklahoma, 105 S.Ct. at 1096. Such an analysis shows the following:

(1) In the two-year period following December, 1981, Alvin Ford's mental health gradually but devastatingly deteriorated. Mr. Ford's deteriorating mental health was documented in two

²⁷ Only one of the five psychiatrists who evaluated Mr. Ford (Dr. Ivory) found him free of psychosis, and as we demonstrate infra, because that psychiatrist's evaluation was procedurally inadequate, his opinion cannot be credited.

ways: by his voluminous correspondence and by periodic psychiatric evaluation, at the request of counsel for Mr. Ford, by Dr. Jamal Amin.

(2) A sampling of Mr. Ford's correspondence was set forth in the habeas petition filed in the District Court. See App. 51a-94a. This correspondence showed a gradual but relentless loss of contact with reality from December, 1981, forward. Over time, Mr. Ford expressed, in his correspondence, virtually all the recognized hallmarks of psychosis, particularly of paranoid schizophrenia. He expressed bizarre delusions; grandiose and religious delusions without persecutory or jealous content; delusions with persecutory content, accompanied by hallucinations; auditory hallucinations in which two or more voices conversed with each other; and finally, incoherence, marked loosening of associations, markedly illogical thinking, and poverty of content of speech, associated with blunted, flat, or inappropriate affect. See American Psychiatric Association, Diagnostic and Statistical Manual of Disorders at 188-190.

(3) During the period of time that Mr. Ford's mental health was deteriorating, Dr. Amin conducted four separate in-person evaluations of Mr. Ford, ending with an interview in August, 1982. Dr. Amin also reviewed the correspondence from Mr. Ford; talked with Mr. Ford's relatives, with his attorneys, and with other inmates, prison personnel, and other people who had directly observed Mr. Ford's behavior over this period of time; and reviewed Mr. Ford's mental health and medical records maintained at Florida State Prison. On the basis of the data he reviewed from all these sources, Dr. Amin identified the above-noted features of psychosis and concluded on June 9, 1983, that Mr. Ford suffered, in an "overwhelmingly convincing" fashion, from paranoid schizophrenia. See App. 153a-155a.

(4) On the basis of this history, Dr. Amin's evaluation, and Mr. Ford's continuing deterioration after Dr. Amin's evaluation, counsel for Mr. Ford initiated a \$ 922.07 proceeding on behalf of Mr. Ford on October 20, 1983.

(5) Because at that time, Mr. Ford would no longer talk with Dr. Amin (due to his delusional belief that Dr. Amin was persecuting him along with members of the Klu Klux Klan who served as correctional officers at Florida State Prison), counsel for Mr. Ford requested that another psychiatrist, Dr. Harold Kaufman, of Washington, D.C., interview and evaluate Mr. Ford. Prior to his evaluation, Dr. Kaufman reviewed the history of Mr. Ford's illness as well as Dr. Amin's evaluation of Mr. Ford. On the basis of this review and his lengthy interview with Mr. Ford, Dr. Kaufman agreed with Dr. Amin that Mr. Ford suffered from schizophrenia. Moreover, because at this time Mr. Ford's competency had come into question, Dr. Kaufman assessed Mr. Ford's competency in light of the criteria set forth in § 922.07. Dr. Kaufman concluded as follows:

It is my conclusion, using the Florida statutory standard you have supplied me with, that because of his psychiatric illness, while he does understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide that he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the governor and control him, President Reagan's interference in the execution process, etc.

App. 158a.

(6) Thereafter, in early December, 1983, Governor Graham appointed three psychiatrists pursuant to § 922.07 to evaluate Mr. Ford: Dr. Umesh Mhatre, Dr. Walter Afield, and Dr. Peter Ivory. On December 15, 1983, four days before their scheduled interview with Mr. Ford, counsel for Mr. Ford provided each of these doctors with an excerpt of the transcript of Mr. Ford's trial in December, 1974, in which a psychiatrist had provided a "psychiatric profile" of Mr. Ford (to provide to the doctors in 1983 a psychiatric baseline against which to measure Mr. Ford's then-current condition), a large sampling of the correspondence from Mr. Ford over the period of time that his mental health had

deteriorated, the psychiatric evaluation by Dr. Amin, and the psychiatric evaluation by Dr. Kaufman. While Dr. Mhatre and Dr. Afield accepted these materials, Dr. Ivory refused them.

(7) On December 19, 1983, Dr. Mhatre, Dr. Afield, and Dr. Ivory conducted an interview with Mr. Ford in the courtroom at Florida State Prison. Present in the courtroom along with the three psychiatrists and Mr. Ford, were counsel from Governor Graham's office, one or two correctional officers, two paralegals who had worked with Mr. Ford, and the two lawyers who had worked with Mr. Ford. The interview lasted approximately thirty minutes. During the course of the interview, the psychiatrists asked very simple, straight-forward questions directed to whether Mr. Ford understood the nature and effect of the death penalty and why the death penalty was being imposed upon him. He responded in the same bizarre manner to these questions as he had responded in an interview with counsel on December 15, 1983. See App. 160a and 102a-107a.

(8) After approximately thirty minutes, the three psychiatrists determined that further interview of Mr. Ford would be fruitless and terminated the interview. Thereafter, they requested that they be able to examine Mr. Ford's cell. They were allowed to do that, and after this inspection, they reviewed Mr. Ford's prison medical records and discussed his condition with the prison's correctional and medical staff.

(9) Before leaving the prison on December 19, 1983, Dr. Ivory requested that he be provided the historical materials and other psychiatric evaluations of Mr. Ford which he had refused on December 15. A copy was provided at approximately noon on December 19, 1983.

(10) On December 20, 1983, Dr. Ivory sent his report to Governor Graham. By his own report, Dr. Ivory based his opinion solely upon the thirty-minute interview with Mr. Ford, the examination of Mr. Ford's cell, and the conversations Dr. Ivory had with prison personnel concerning Mr. Ford. See App. 160a-162a. On the basis of this data, Dr. Ivory concluded that "in spite of the verbal appearance of severe incapacity, from his

consistent and appropriate general behavior, [Mr. Ford] showed that he is in touch with reality," and that he "comprehend[ed] his total situation including being sentenced to death, and all of the implications of that penalty." Id.

(11) Without considering Mr. Ford's documented history of psychosis or the opinions of Dr. Amin and Dr. Kaufman respecting Mr. Ford's condition, however, Dr. Ivory was at a distinct disadvantage, for the interview with Mr. Ford on December 19 presented only a very small part of a much larger picture.²⁸ The only symptom of illness presented there was marked incoherence of speech. Because of his refusal to consider matters not apparent in the interview on December 19, rather than evaluating this symptom in the context of all of Mr. Ford's other previously documented symptoms of illness, Dr. Ivory treated this symptom as the only one. Within this framework, when he observed Mr. Ford's alert and appropriate non-verbal behavior during the interview, his well organized cell, and his apparent ability to function independently on a day-to-day level, he found a sharp conflict with the "pervasive disorganization" suggested by Mr. Ford's verbal behavior during the interview. Thus, Dr. Ivory quite naturally concluded that Mr. Ford's "disorder, although severe, seems contrived and recently learned." The pervasiveness of the disorder suggested by his verbal behavior simply was not confirmed by anything else Dr. Ivory observed.

(12) On December 28, 1983, Dr. Mhatre sent his report to Governor Graham. Unlike Dr. Ivory, Dr. Mhatre did review the documented history of Mr. Ford's psychosis, as well as the prior evaluations by Dr. Amin and Dr. Kaufman. On the basis of his

²⁸ To avoid misdiagnosis due to failure to consider all the possible -- and varied -- manifestations of mental illness, the psychiatric profession has for many years maintained that a comprehensive examination is necessary before a diagnosis can be reached. At a minimum, such examination requires a thorough review of medical and psychiatric history, as well as prior psychiatric assessments. The history "focuses on those factors affecting growth and development as they pertain to the patient's physical, social, intellectual, and interpersonal functioning." H. Kaplan, B. Sadock, Comprehensive Textbook of Psychiatry 487-88 (Fourth Edition 1985). See also S. Arieti, American Handbook of Psychiatry 1161 (Second Edition 1974).

review of these materials, along with his interview with Mr. Ford, his inspection of Mr. Ford's cell, and his conversations with prison personnel, Dr. Mhatre concluded that Mr. Ford suffers from "psychosis with paranoia." App.163a-164a. Nonetheless, Dr. Mhatre also concluded that Mr. Ford was competent under the criteria set forth in § 922.07:

In spite of psychosis, he has shown ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty and why it is to be imposed upon him.

App. 164a. Dr. Mhatre gave no further indication of the reasoning process that brought him to this conclusion about competency. He did not attempt to explain the apparent contradiction between finding Mr. Ford psychotic -- the central feature of which was his delusions, and in particular, his belief that he could not be executed -- with his finding of competency under the criteria of the Florida statute.²⁹ Despite this gap in Dr. Mhatre's reasoning process, he did predict that if left untreated Mr. Ford would likely become incompetent. App. 164a. Six months later, without treatment, Mr. Ford's condition did substantially worsen. App. 167a-168a. Dr. Mhatre's opinion concerning competency was, therefore, accurate in this respect.

(13) On January 19, 1984, Dr. Afield sent his report to Governor Graham. On the basis of his review of all the data concerning Mr. Ford -- his correspondence, the evaluations by Dr. Amin and Dr. Kaufman, the interview with Mr. Ford, the conversations about Mr. Ford with prison personnel, the inspection of Mr.

²⁹ Dr. Mhatre's finding that Mr. Ford "has shown ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him," does not support his conclusion that Mr. Ford is able to perceive external reality -- particularly as to why he may be executed -- in an accurate manner. His finding shows only that Mr. Ford appears to function adequately and appropriately on a day-to-day level. But the ability to function in such a way does not avoid the psychiatrist's obligation to assess the pertinent delusional processes, for "[the] impairment in functioning may be minimal if the delusional material is not acted upon, since gross disorganization of behavior is extremely rare." American Psychiatric Association, Diagnostic and Statistical Manual at 191.

Ford's cell, and the review of Mr. Ford's prison medical records -- Dr. Afield concluded that while Mr. Ford "does not fit any classical description of psychiatric illness," the profoundness of his disorganization "forces me to put a 'psychotic' label on the inmate." App. 166a. Notwithstanding this diagnosis, Dr. Afield also concluded that "although this man is severely disturbed, he does understand the nature of the death penalty that he is facing and is aware that he is on death row and may be electrocuted. The bottom line in summary is, although sick, he does know fully what can happen to him." Id. Dr. Afield reported nothing further concerning his evaluation of Mr. Ford.

(14) It is thus apparent that Dr. Afield failed to express an opinion on the matter that was at issue: whether Mr. Ford understood why the death sentence would be carried out against him. Dr. Afield limited his opinion to the determination that Mr. Ford understood the nature of the death penalty and that he may be electrocuted. He did not determine whether Mr. Ford understood why he may be electrocuted.³⁰ Accordingly, Dr. Afield's report not only failed, as did Dr. Mhatre's report, to evaluate the delusional material which is centrally relevant to the competency determination and which he apparently relied upon in concluding that Mr. Ford was psychotic, but also failed altogether to address the question upon which the competency determination concerning Mr. Ford must rest: whether he understands why the death penalty is to be imposed upon him.

(15) In preparation for an evidentiary hearing on this matter, counsel for Mr. Ford asked two experts in the field of forensic psychiatry to review the manner in which Mr. Ford was evaluated by the three psychiatrists appointed by Governor Graham. Dr. Seymour Halleck, a nationally-recognized scholar and practitioner, concluded that the process by which the three

³⁰ Clearly there is a difference between understanding that you may be electrocuted and why you may be electrocuted. Mr. Ford understands that he may be electrocuted ("maybe because I am a smart ass," Appendix 157a), but he does not understand accurately why he may be electrocuted ("I won't be executed because of no crime.... I can't be executed because of the landmark case. I won." Appendix 157a-158a).

appointed psychiatrists evaluated Mr. Ford, "fell below the generally accepted standard of care necessary to produce a reliable forensic psychiatric evaluation." App. 171a. Dr. Halleck gave three reasons for this conclusion. First, the crowded and impersonal conditions under which the interview was conducted, as well as the inordinately short amount of time spent interviewing Mr. Ford, were unlikely to produce sufficient data for reliable forensic evaluation. App. 171a.³¹ Second, Dr. Ivory may not have considered the reports of Dr. Amin and Dr. Kaufman, or other available information, in making his evaluation of Mr. Ford, and this lack of data could have seriously compromised the quality of his examination. App. 172a.³² Third, all three of the psychiatrists

failed to account for the facts contained in [Mr. Ford's] history which were central to the forensic task at hand: whether Mr. Ford's delusional processes which, among other things, had led him to believe that he had won his case and could no longer be executed, were relevant to the issue of his incompetence, in that he failed to understand why he was to be executed, or as Dr. Kaufman put it, failed to understand "the purpose" of his execution. Dr. Kaufman had previously concluded that Mr. Ford was incompetent precisely because of his delusional processes. Yet neither Dr. Ivory, Dr. Mhatre or Dr. Afield dealt with this most crucial data in their reports.

App. 172a.³³

³¹ See also S. Halleck, Law in the Practice of Psychiatry 201 (1980); S. Pollack, Psychiatric Consultation for the Courts, 1 Bull. Am. Acad. Psych. & L. 267, 275-76 (1973) [hereafter cited "Pollack"].

³² See n.28 supra.

³³ "The purpose of the psychiatric-legal report is to furnish data for legal disposition which will be effected by attorney, judge, or jury. The most significant data are the psychiatrist's conclusions about this legal disposition. In his explanation of the reasoning which led to his conclusions, the psychiatrist must adopt the logical reasoning approach followed by the legal system. In these psychiatric reports, the organization of material should be determined by this logical reasoning rather than by the empirical approach used in medicine. For example, description of psychopathological phenomena and elaboration of psychodynamics have no significance and are unnecessary unless they can logically be related to the legal issue. The psychiatrist's reasoning in establishing and demonstrating this relationship is crucial. Upon psychiatric reasoning, not psychiatric conclusion or opinion, will depend the weight and value which the court or jury accords the report." Pollack at 277-78 (footnote omitted) (emphasis in original). Accord American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic

(16) The other expert in forensic psychiatry with whom Mr. Ford's counsel consulted was Dr. George Barnard, a professor in the Department of Psychiatry at the University of Florida. Dr. Barnard agreed with the three observations made by Dr. Halleck with respect to the inadequacy of the evaluations conducted by Dr. Ivory, Dr. Mhatre, and Dr. Afield. Moreover, Dr. Barnard took specific issue with Dr. Ivory's great reliance on the state of Mr. Ford's cell:

Dr. Ivory expressed his belief that because Ford had a clean and organized cell that this indicated to him that Ford could not have a disorganized mind or thought system in that insanity was not selective but pervasive. To this reviewer, it appears that Dr. Ivory is of the opinion that there is a significant correlation between disorganization of internal thoughts and the way that one keeps a room. From my understanding of the literature it is apparent that one can be highly disorganized internally and yet keep a clean room as well as one can be highly disorganized in the way he keeps his room and yet be very organized and productive in his thought processes.

App. 190a.³⁴ In concluding, Dr. Barnard gave particular emphasis to the failure of all three appointed psychiatrists to confront and explain in any rational way why the obvious and marked delusions suffered by Mr. Ford did not, in their opinions, make Mr. Ford incompetent:

The materials which I reviewed give evidence of documenting symptoms in Ford which are consistent of the diagnosis of schizophrenia, paranoid type. These symptoms include delusions of persecution, delusions of grandeur, thought blocking, thought insertion, thought broadcasting, flat affect, loosening of associations and disturbance of speech with word gibberish. In the psychiatric interview conducted by the three examiners appointed by the Governor, Ford was uncooperative and he gave them few meaningful verbal responses so that they relied heavily upon his nonverbal productions and their ability to read between the lines for what he might be meaning with his nonsensical replies to their questions. In my opinion, the three examiners give conclusionary opinions about Ford's competency to be executed without documenting in a satisfactory manner their evidence or facts upon which their inferences are based. As a result, in my opinion, the factfinder and, in this case, Governor Graham and/or the Court is left with the dilemma of depending on conclusionary belief statements by the psychiatrists that

Psychiatry 206 (1984).

³⁴ See n.29, supra.

Ford is competent to be executed without adequate documentation by the psychiatrists so that the factfinder must rely on the credentials of the psychiatrists rather than data. In my opinion, this leaves the factfinder in a very unsatisfactory position....

App. 192a-193a.

Accordingly, there was sharply divergent opinion concerning Mr. Ford's competency, notwithstanding the nearly unanimous opinion concerning his suffering from schizophrenia. The psychiatrist who found Mr. Ford both psychotic and incompetent fully documented the facts, as well as the reasoning, that led him to that conclusion. The psychiatrists who found Mr. Ford psychotic but competent documented, to some extent, the basis for their conclusions that Mr. Ford was psychotic, but failed to explain at all why, suffering from this condition, Mr. Ford was nevertheless competent. And finally, the psychiatrist who found Mr. Ford to be free of psychosis and competent appeared not to have considered at all the data crucial to such a determination and, in the opinion of forensic experts, could not therefore be credited as having reached a reliable conclusion.

On the basis of these facts, Mr. Ford could not be found competent without a hearing. The "paper record" would not support such a finding. Only in a hearing -- where the factfinder could hear all the psychiatrists respond to questions regarding their investigative and analytic processes -- could a reliable determination be made that Mr. Ford is competent. In the absence of such a hearing, the governor's determination that Mr. Ford is competent affords no assurance that he is.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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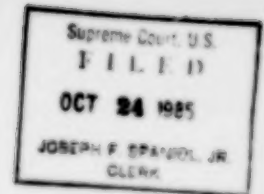
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NO. 85-5542 *(D)*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or Connie Ford,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER A STATE PRISONER WHO HAS BEEN SENTENCED TO DEATH, AND WHO HAS WITHOUT QUESTION, BEEN SANE FROM THE TIME OF THE CRIMINAL OFFENSE, THROUGHOUT TRIAL AND FOR SEVEN YEARS THEREAFTER, MAY CLAIM, ON THE EVE OF EXECUTION, AN EIGHTH AND FOURTEENTH AMENDMENT RIGHT TO A JUDICIAL DETERMINATION OF HIS SANITY?

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NO. 85-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or Connie Ford,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

OPINIONS BELOW

The opinion which is the subject of the present petition is Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). Rehearing en banc was denied on June 3, 1985. The district court's order which was the order appealed is an oral order which the Petitioner has set forth in pages 18(a) to 30(a) of his appendix.

The Florida Supreme Court's opinion which deals with the issue presented here is Ford v. Wainwright, 451 So.2d 471 (Fla. 1984), and it is included in the Petitioner's appendix at pages 13(a) to 17(a).

The prior proceedings involving this Petitioner, aside from those cited above, include: his direct appeal, Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, Ford v. Florida, 445 U.S. 972 (1980); his consolidated original habeas corpus and collateral appeal in the Florida Supreme Court, Ford v. State, 407 So.2d 907 (Fla. 1981); a federal habeas corpus petition which was

denied on December 7, 1981; and affirmance of that denial by a panel and ultimately the en banc Eleventh Circuit, Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982) and Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). The Petitioner was also a named party in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

JURISDICTION

The Respondent accepts the Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Eighth and Fourteenth Amendments quoted by the Petitioner, Fla. Stat. §922.07 (1983) is involved. That statute states:

922.07 Proceedings when person under sentence of death appears to be insane.--

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On July 21, 1974, the Petitioner murdered a police officer in the course of an attempted robbery. After years of litigation, his direct and collateral appeals were concluded. In late 1983, the Governor of Florida appointed a commission of three psychiatrists pursuant to the provisions of Fla. Stat. §922.07 (1983) to evaluate the Petitioner's current mental condition. The commissioners submitted written reports to the Governor, and they all stated their findings that the Petitioner was sane (Petitioner's appendix, pages 160-166).

The Governor signed a death warrant on April 20, 1984, and the Petitioner's execution was scheduled for May 31, 1984. On May 21, 1984, the Petitioner filed in the state trial court a motion for hearing and appointment of experts for determination of competency to be executed. The motion was denied. The Florida Supreme Court, on May 25, 1984, affirmed the trial court's order. Ford v. State, 451 So.2d 471 (Fla. 1984).

The Petitioner then filed his second Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida, on May 25, 1984 (Petitioner's appendix, pages 41(a)-152(a)). The district court heard legal argument on May 29, 1984. (An excerpt of the argument is included in the Respondent's appendix at pages 1-23). At the conclusion of the hearing, the district court ruled the petition was an abuse of the writ. (Petitioner's appendix, pages 26(a) and 27(a)). The court ruled alternatively on the merits and denied the petition. (Petitioner's appendix, pages 27(a) and 28(a)).

A divided panel of the United States Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and a stay of execution on May 30, 1984. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). By a vote of 6-3, this Court denied the State's motion to vacate the stay. Wainwright v. Ford, ___ U.S. ___, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984). After full briefing and oral argument, a panel of the Eleventh Circuit affirmed, by a 2-1 vote, the district court's order. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). Rehearing en banc was denied.

B. Statement of the Facts

The Governor of Florida, pursuant to the provisions of Fla. Stat. §922.07(1), appointed a commission of three psychiatrists to examine the Petitioner for the purpose of determining whether he understood the nature of the death penalty and why it was to be imposed upon him.

The commissioners--Doctors Peters Ivory, Umesh Mhatre, and Walter Afield--examined the Petitioner on December 19, 1983. Each commissioner then submitted a written report to the Governor stating his findings.

Dr. Ivory reported:

I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior he showed that he is in touch with reality . . . (Petitioner's appendix, page 160(a)).

This inmate's disorder, although severe, seems contrived and recently learned. My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty. (Petitioner's appendix, page 162(a)).

Dr. Mhatre's report to the Governor stated:

The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized . . .

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed upon him. (Petitioner's appendix, page 164(a)).

Dr. Afield concluded:

. . . Although this man is severely disturbed, he does understand the nature of the death penalty that he is facing, and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him.
(Petitioner's appendix, page 166(a)).

Thus, all three commissioners independently concluded the Petitioner understood the death penalty and why it was to be imposed on him.

C. How the Federal Questions Were Presented in the Courts Below

The Respondent, in answer to the Petition for Habeas Corpus filed in the district court, alleged the petition was an abuse of the writ. The district court so held. (Petitioner's appendix, page 27(a)).

In his brief filed in the Eleventh Circuit, the Respondent argued as its issue II:

The district court correctly held review on the merits was barred due to the Petitioner's abuse of the writ.

The Court of Appeal did not reach the issue, stating:

The summary holding of abuse of the writ on the insanity issue is troublesome under the facts presented. In light of our resolution of the merits of this issue, however, it is not necessary that we reach the question.

Ford v. Wainwright, 752 F.2d 526, 527, n. 1 (11th Cir. 1985).

The Petitioner has otherwise accurately stated the manner in which the federal questions were decided in the courts below.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEAL'S REJECTION OF THE PETITIONER'S CLAIM OF ENTITLEMENT TO A JUDICIAL DETERMINATION OF HIS SANITY TO BE EXECUTED WAS CORRECTLY BASED ON CONTROLLING PRECEDENT OF THIS COURT; ALTERNATIVELY, THE DISTRICT COURT CORRECTLY FOUND AN ABUSE OF THE WRIT AND THUS, AT LEAST IN REGARD TO THIS PETITIONER, CERTIORARI IS INAPPROPRIATE.

The Petitioner asks this Court to grant review of his case for the purpose of creating an Eighth and Fourteenth Amendment right which has never before been recognized by any court. The right the Petitioner seeks to establish is not compelled by the decision in Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) for in Ake the issue was whether the Constitution requires that an indigent defendant be provided with the psychiatric assistance necessary to prepare an insanity defense when sanity at the time of the offense is seriously in question. Ake at 84 L.Ed.2d 58. In the present case, there is no question that the Petitioner was sane at the time he committed the murder, during his trial, and for years thereafter.¹ The validity of his conviction and sentence, the Petitioner concedes, are no longer at issue. (Petition, page 2). The sole contention presented by the Petitioner is the assertion that he has a constitutional right not to be executed due to his alleged present insanity, and that accordingly he is entitled to a judicial determination of his mental condition.

The Respondent maintains the issue presented by the Petitioner is without merit, and the petition should be denied based on controlling authority from this Court. In three prior cases, this Court has rejected the claim

¹The Petitioner alleges his mental condition began to deteriorate in December, 1981, seven years after his trial.

presented herein: Nobles v. Georgia, 168 U.S. 398 (1897); Solesbee v. Balkcom, 339 U.S. 9 (1950); Caritativo v. California, 357 U.S. 549 (1958).

First, in Nobles v. Georgia, 168 U.S. 315 (1897), this Court held the question of insanity after verdict did not give rise to an absolute right to have the issue tried before a judge and jury, but was addressed to the discretion of the judge. The court concluded the matter in which the sanity question was to be determined was merely a matter of legislative regulation. This decision led to Solesbee v. Balkcom, 339 U.S. 9 (1950) where the court held the Georgia procedure whereby the Governor determined the sanity of an already convicted defendant did not offend due process:

We are unable to say that it offends due process for a state to deem its Governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to Governors. And here the Governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that Governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.

* * * * *

To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved.

Id. at 12-13.

Finally, in Caritativo v. California, 357 U.S. 549 (1958), this Court reaffirmed Solesbee.

The Petitioner's attempt to characterize these

decisions as antiquated relics of an unenlightened era should not be accepted. The thrust of the Solesbee holding is the determination of post-conviction insanity can properly be deemed an executive function because it is akin to clemency, and it did not offend due process for the Governor, with the aid of physicians, to make the determination.

In this case, the Eleventh Circuit found Solesbee dispositive of both the Eighth and Fourteenth Amendment claims because they did not significantly differ. The court noted that Solesbee had been recognized as good law in its recent decision Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984). Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985). The Solesbee analysis was also adopted in Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) which held the clemency procedures used by the Florida Governor and his cabinet were an executive function.

The present claim, which concerns the narrow question of sanity to be executed, has never been deemed to be a constitutional right or part of the judicial process. It is a discretionary stage with which the courts are not concerned. Gregg v. Georgia, 428 U.S. 153, 160 (1976). [. . . "a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor . . . The existence of these discretionary stages is not determinative of the issues before us . . .]

It is important to note here that Florida does not purport to execute insane persons. The legislature has enacted Fla. Stat. §922.07 to ensure an insane person is not executed, and it was invoked on the Petitioner's behalf. Pursuant to the statute, the Governor appointed a commission of three experts to examine the Petitioner and they submitted reports to the Governor. All three doctors

determined the Petitioner was sane. Acting on this information, the Governor issued a warrant. As the Respondent pointed out in additional authority submitted to the Eleventh Circuit, the Florida procedure set forth in §922.07 is adequate to prevent the execution of insane persons. In the case of Gary Eldon Alvord, the Governor followed the statute. Two of the appointed commissioners (Drs. Ivory and Mhatre) in Alvord's case were also commissioned in the Petitioner's case. In Alvord, the Governor determined the prisoner was insane and ordered him committed to a mental hospital (see Respondent's appendix, pages 24-29).

The Florida procedure is akin to that of other states. Within the Eleventh Circuit, in Alabama, the trial court has exclusive and nonreviewable jurisdiction to determine if an execution should be suspended due to insanity. Alabama Code, §15-16-23 (1981). In Georgia, as in Florida, the Governor in his discretion may appoint physicians to examine a prisoner, and upon reviewing their reports, he may commit the prisoner to a mental hospital. Georgia Code Ann., §17-10-61. The statute also states that no person who has been convicted of a capital offense shall be entitled to an inquisition or trial to determine his sanity. §17-10-60; McLendon v. Balkcom, 207 Ga. 100, 60 S.E.2d 753 (1950).

Nationally, many states vest the authority to initially inquire into a condemned inmate's sanity in the warden of the prison where he is incarcerated. See, Ariz. Rev. Stat. Ann. (1982), §13-4021; Ark. Stat. Ann. (1977), §43-2622; Calif. Penal Code (1979), §3701; Conn. Gen. Stat. (1980), §54-101; Kan. Stat. (Supp. 1981), §22-4006; Miss. Code Anno. (1983 Supp.), §99-19-87; Neb. Rev. Stat. (1979), §29-2537; Nev. Rev. Stat. (1983), §176.425; New Mex. Stat. Ann. (1978), §31-14-4; Ohio Rev. Code Ann. (1982 Supp.), §2949.28; Okla. Stat. Ann. (1983),

§1005; Utah Code Ann. (1982), §77-19-13(1); Wyo. Stat. (1984 Cum. Supp.), §7-13-901. Other jurisdictions vest this power in the Governor, in procedures similar to Florida's. See, N.Y. Corr. Law (1983 Supp.), §665; Md. Ann. Code, Art. 27 §75(c); Mass. Gen. Laws Ann. (1984 Supp.), Ch. 279 §62. It is evident from a survey of these statutes that the present law, as did the common law, regards the determination of post-sentence insanity as a matter for the executive or the prisoner's custodian to determine, for humanitarian reasons. As the Oklahoma Supreme Court explained in Bingham v. State, 169 P.2d 311 (1946), it is not a right of the prisoner, but based on public will and a sense of propriety. Put another way, the question of supervening insanity is not a right which the defendant may urge or have urged on his behalf by any court; the inquisition may be instituted by the proper officers for humanitarian reasons. State v. Alexander, 49 P.2d 408, 413 (Utah 1935); see also, Berger v. People, 231 P.2d 799, 123 Colo. 403 (1951).

Thus, contemporary statutes are entirely consistent with this Court's reasoning in Soleasbee, and the Eleventh Circuit correctly relied on that decision. To conclude otherwise would invite never-ending litigation. The concern of this Court expressed in Nobles v. Georgia, 168 U.S. 398, 405-406 (1897) is just as valid today:

If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue . . . it would be wholly at the will of the convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

See also, People v. Eldred, 86 P.2d 248, 103 Colo. 334 (1938); State v. Alexander, 49 P.2d 408 (Utah 1935).

The Petitioner's claim he is entitled to a judicial, rather than a gubernatorial, determination would not end the matter. Certainly he would then claim a right to appeal any adverse district court determination to the Circuit Court of Appeal, and following the appeal, a right to petition this Court for certiorari. By the time this lengthy process would be completed, he could file a new petition claiming that in the time elapsed since the former petition, his condition had significantly worsened so the prior holding was no longer accurate. Thus, the determination of post-conviction insanity has been properly delegated to the executive and it does not rise to the level of a constitutional right. To quote Chief Justice Berger, "All that is good is not commanded by the Constitution and all that is bad is not forbidden by it." Palmer v. Thompson, 403 U.S. 217, 226 (1971).

In the alternative, even if this Court concludes the Petitioner presents an important constitutional question, it should be left to another case to decide it, for the present Petitioner has abused the writ. Rule 9(b), Rules Governing 28 U.S.C. §2254 Proceedings. The Respondent argued abuse of the writ in the courts below and has preserved this defense throughout the proceedings. (See Respondent's appendix, pages 1-23, argument before district court). The district court agreed, finding "an abuse of the writ throughout this matter" (Petitioner's appendix, page 27(a)). In its order granting a stay of execution, a panel majority held only "for the purpose of staying Ford's execution" that there was no abuse of the writ. Ford v. Strickland, 734 F.2d 836, 840 (11th Cir. 1984). The panel which decided the case on the merits characterized the holding of abuse of the writ as "troublesome" but did not decide it. Ford v. Wainwright, 752 F.2d 826, 827, n. 1 (11th Cir. 1985).

The Respondent maintains its assertion of abuse of the writ, in and of itself, is an adequate basis for denial of the petition. There was no need to conduct an evidentiary hearing in the district court, for there were no facts in dispute. The Respondent relied on the dates alleged in the petition to establish his claim that the Petitioner's counsel were well aware of his condition and yet never approached a court until ten days prior to his execution. (Respondent's appendix, pages 17-20). The Petitioner's first habeas corpus petition was, on appeal, heard by both a panel and by the en banc Circuit Court of Appeal. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982); Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). The second petition, filed when execution was imminent, was, like Woodard v. Hutchins, ___ U.S. ___, 104 S.Ct. 732, 78 L.Ed.2d 341, 349 (1984), "another capital case in which a last minute application for a stay of execution and a new Petition for Writ of Habeas Corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ."

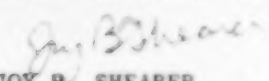
Therefore, without regard to the issue raised by the Petitioner, the court below's decision is sustainable on the alternative basis of abuse of the writ.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities, the Respondent respectfully requests that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL 32301


JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

NO. 85-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or Connie Ford,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

CERTIFICATE OF SERVICE

I, Joy B. Shearer, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, in the above case to counsel for Petitioner, by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Richard H. Burr, III
Office of the Public Defender
224 Datura Street, 13th Floor
West Palm Beach, FL 33401

Laurin A. Wollan, Jr.
1515 Hickory Avenue
Tallahassee, FL 32303

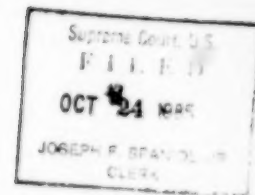
All parties required to be served have been served. Done
this 21st day of October, 1985.


JOY B. SHEARER
Assistant Attorney General
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RESPONDENT'S APPENDIX

JIM SMITH
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31092

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THE COURT: Mr. Burr.

MR. BURR: Thank you Judge.

Your Honor, because of the separateness and complexity of some of the issues we have divided our argument among the three of us and at the appropriate time we will be switching if that is okay with Your Honor.

THE COURT: That's fine with me.

How long do you anticipate?

MR. BURR: We have tried to gear our total argument to something in the nature of 35 to 45 minutes.

THE COURT: You don't get that much time in front of the Court of Appeals.

MR. BURR: We will try to do it in 30 minutes. We are conscious of the time, Your Honor, and we will be addressing only the issues which we think have to be addressed.

THE COURT: Very well.

Please proceed.

MR. BURR: Your Honor, I would like to address, first of all, the competency issue and the facts of competency and the abuse of the writ question related to competency because those two go hand in hand; and certainly abuse of the writ is a special issue that we have to get over before there is anything else to talk about with respect to the competency issue. So I will limit my opening

1 remarks to what we submit is the right of Alvin Bernard Ford
2 not to be executed when he is incompetent.

3 THE COURT: Well why are we arguing about that?
4 Isn't the law fairly settled that executions don't take place
5 if someone is incompetent?

6 MR. BURR: We submit that it is.

7 THE COURT: Why don't you address yourself to
8 something that might be in issue?

9 MR. BURR: Well I think abuse of the writ is in
10 issue. It certainly is an issue that the State has raised.

11 THE COURT: So you are addressing the question not
12 on whether or not an incompetent person can be executed but
13 whether or not there's abuse of this writ.

14 MR. BURR: That is correct.

15 THE COURT: Very well.

16 Please proceed.

17 MR. BURR: As I said the facts of competency and
18 the question of abuse are intertwined.

19 The most important thing to note about abuse of the
20 writ from our perspective and I think from the Court's
21 perspective is that Alvin Ford did not become incompetent
22 in the estimate of Counsel and observers of Mr. Ford until
23 October of 1983 --

24 THE COURT: Hasn't the State contended differently?

25 MR. BURR: The State does contend differently and

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FORT LAUDERDALE, FLORIDA

5
1 to the extent that it rests on a different interpretation of
2 facts I think the facts would have to be resolved in a hearing,
3 but I don't think that the facts which genuinely go to any
4 issue arose are in dispute because I don't think the State
5 has been able to put them in dispute.

6 THE COURT: Well that psychiatrist testified before
7 me nearly three years ago.

8 MR. BURR: That's right; but he said nothing about
9 competency. His testimony was solely related to whether at
10 the time of the incident Mr. Ford was laboring under any
11 extreme mental or emotional disturbance, and he postulated
12 that he was. At that point in time we made no claim about
13 his current competency. There was no claim made about his
14 competency at trial. There was no claim ever made about
15 Alvin Ford's competency.

16 THE COURT: No. But could you have.

17 MR. BURR: In my estimation --

18 THE COURT: In December of 1981 when I had a hearing
19 in this matter, evidentiary hearing.

20 MR. BURR: Absolutely not. I had no reason on earth
21 to believe Alvin Ford was incompetent. He could speak with
22 me about the issues in the case and explained what went on
23 in the incident without any degree of difficulty at all.

24 THE COURT: But you were not his Counsel then,
25 were you?

1 MR. BURR: I became his Counsel in the course of
2 that proceeding and had the opportunity while he was in Fort
3 Lauderdale for that proceeding to spend a good deal of time
4 with him. There was no question in my mind of competency.

5 THE COURT: Wait a minute. Let's go into that a
6 little bit.

7 You became his Counsel during the course of that
8 proceeding?

9 MR. BURR: I appeared with Mr. Wollan from
10 Tallahassee.

11 The Friday evening when we first appeared before
12 Your Honor, Mr. Wollan was the only Counsel and at that point
13 shortly after the proceeding started that Friday night, Your
14 Honor admitted me to assist in representation of Mr. Ford.

15 THE COURT: When did your co-Counsel leave?

16 MR. BURR: He is still co-Counsel.

17 THE COURT: He's not here.

18 MR. BURR: He's not here. Since that day, since
19 that time, my circumstances have changed. I have become a
20 member of the Public Defender's Office for this State
21 Judicial Circuit and that office has taken over the
22 representation of Mr. Ford along with Mr. Wollan.

23 THE COURT: Very well.

24 Please proceed.

25 MR. BURR: From December of 1981 on, there began

1 to be some deterioration of Mr. Ford. The deterioration was
2 hardly noticeable at first. In late December, early January,
3 he began talking about his ability to communicate with the
4 staff of the radio station in Jacksonville. Seemed quirky
5 but who knew what that meant. Sometime later, in late
6 February of 1982, Mr. Ford began what became a genuine
7 obsession with the Ku Klux Klan. Mr. Ford became convinced
8 that in late February '82, that a Ku Klux Klan had burned
9 a house in Jacksonville where a black family had been killed
10 and he attempted to communicate that message to a number of
11 people through letters. He says that he talked with the
12 staff of the radio station about his insight. He wrote one
13 very, very long letter, which is in the habeas petition,
14 explaining how he got the insight about the Ku Klux Klan's
15 role in that arson.

16 Again, we knew about that. We got copies of the
17 letters that he wrote. But there was at that point nothing
18 to suggest that whatever was happening with Mr. Ford was
19 intertwined with his understanding of his case.

20 He continued. Several months later in 1982 he
21 began to think that the Ku Klux Klan had members serving as
22 correctional officers at Florida State Prison. He thought
23 that these officers were put there to harass him and to
24 make him commit suicide. He believed that these officers
25 were holding people hostage and there is what he calls a

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1 "pipe alley a tunnel behind his cell at Florida State Prison
2 where he thought hostages were being held. He describes
3 in his letters the torture of the hostages and torture of
4 himself emotionally again by what was going on. Again,
5 strange stuff. Certainly an indication that he might be
6 becoming psychotic. But when we visited with Mr. Ford he
7 was able to talk with us about his case, he had an under-
8 standing where the case was in the Courts and he seemed to
9 be becoming more concerned about what he called the hostage
10 crisis than about anything else. But we were still able
11 to communicate with him.

12 That proceeded through 1982 pretty much in that
13 fashion with the delusions growing in scope and with more
14 people being brought into the delusions; the number of
15 hostages that he thought were being held increased. He
16 began writing more impassioned letters to people that he
17 thought had the power to help him.

18 THE COURT: What did you do about that?

19 MR. BURR: Well we talked, we tried to see Mr.
20 Ford as often as we could, and we engaged the services of --

21 THE COURT: "We"? "We"?

22 MR. BURR: "We," meaning Counsel for Mr. Ford.

23 At that point in the fall of 1982 I was in West
24 Palm Beach and my colleagues in the Public Defender's Office
25 and I attempted to counsel with Mr. Ford. We also obtained

1 the services of a psychiatrist, Doctor Jamal Amin who
2 testified before, has been seeing Mr. Ford all along and was
3 able to see Mr. Ford through about August of 1982 and at
4 that point Mr. Ford began to think that Doctor Amin was one
5 of his persecutors, began to think that he was in conspiracy
6 with the Ku Klux Klan to hold hostages and drive him crazy
7 so he refused to see Doctor Amin in about August of '82.
8 Doctor Amin continued consulting with us to help us in our
9 dealings with Mr. Ford to try to bring some sense of reality
10 to him. But by January of 1983 it was clear that we needed
11 another psychiatrist to try to get in to see Mr. Ford.

12 At that point we asked for the assistance of a
13 psychiatrist from Washington D.C. named Harold Kaufman, and
14 from that point through the present Doctor Kaufman has
15 consulted with us and has seen Mr. Ford on a couple of
16 occasions. He has also reviewed hours of taped interviews
17 with Mr. Ford.

18 THE COURT: Why would you go to Washington D.C.
19 for a psychiatrist?

20 MR. BURR: Well, we were looking --

21 THE COURT: Is he one who was going to say what you
22 wanted him to say?

23 MR. BURR: We had no reason to know what he would
24 say.

25 THE COURT: I mean some psychiatrists have that

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reputation both ways.

MR. BURR: Why sure. I did not know anything about Doctor Kaufman's reputation except that he was, had been for a number of years a consultant with the D.C. Court of Appeals, the D.C. Circuit Court of Appeals on psychiatric issues. He was also himself a lawyer and in our situation that was important because in late 1982 Mr. Ford began to suggest that he wanted to drop his appeals in his case. We at that point thought that he might be not competent to make an intelligent choice about dropping his appeals and that in fact had reason to believe that he had reason to do that as a way of ending the hostage crisis. So we got Doctor Kaufman's assistance for that reason initially. We knew we might be in a position of questioning Mr. Ford's ability to drop his appeals because he was making, he was saying those things at that point. So we turned to a psychiatrist who knew forensic psychiatry and the law and in our situation we thought that would be very helpful and he came well recommended by virtue of his consultation with the D.C. Circuit.

Through 1983 Mr. Ford's delusional system continued to change somewhat. The hostage crisis theme was still there but he began to develop other delusions as well and I believe in about April of 1983 or May Mr. Ford indicated that he had joined the Ku Klux Klan and not too

1 long after that he started writing in his letters that he
2 was ending the hostage crisis, that he himself had brought a
3 number of the perpetrators into the Courts, had appointed
4 new justices of the Florida Supreme Court and there was a
5 sentence that within his delusional world he had gained some
6 resolution of what he had called the hostage crisis. Even
7 at that point at the times that Mr. Ford would come out to
8 visit, and he frequently would not come out to see us when
9 we went to see him at the prison, we had no reason to
10 believe that he thought that he couldn't be executed or that
11 he had no understanding of why he was on Death Row; and for
12 us that was the critical factor that we were looking at.
13 We were at a point in his case where consultation with him
14 about the issues in his case was not necessary because the
15 issues were proceeding through the Courts in a fairly regular
16 manner and there were legal decisions to be made but the
17 choice of issues to litigate had been made long before.

18 THE COURT: Why would you just watch all this as
19 you have described then, and do nothing?

20 MR. BURR: Your Honor, we did not do nothing. We
21 retained the services of psychiatrists --

22 THE COURT: Why didn't you file something in the
23 Courts?

24 MR. BURR: I didn't -- I had no reason to file
25 anything because I had no reason to think there was a legal

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1 claim related to his state. This was --

2 THE COURT: Why?

3 MR. BURR: Pardon me?

4 THE COURT: Why would they tell us he was fine and
5 dandy?

6 MR. BURR: No. Both Doctor Amin --

7 THE COURT: What were they telling you then?

8 MR. BURR: Doctor Amin and Doctor Kaufman were
9 saying to us they thought Mr. Ford was psychotic but his
10 psychosis at that point focused on nothing to do with this
11 case, had nothing to do with his ability as far as he could
12 tell to understand his case. He seemed in our conversations
13 with him to be aware that he was on Death Row in Florida
14 for the murder of Dimitri Walter Ilyankoff and that he was
15 under sentence of death and at that point in time that much
16 orientation to reality was all that the law required. We
17 had no basis for a claim.

18 I have to stress that our contact with Mr. Ford,
19 though we attempted to have a good deal of contact, was not
20 as frequent as we would have liked. We went to the prison
21 to see him quite often and he would not come out and the
22 prison's policy is not to bring somebody out that doesn't
23 want to see their lawyer. We questioned a good deal of the
24 prison staff about whether he was being treated. The
25 prison's medical staff took the position that there was

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1 nothing wrong with Mr. Ford. So we were caught in a position
2 of not being able to get him any treatment for what our
3 psychiatrists thought was a serious illness because the
4 prison wouldn't treat him. We were in a position --

5 THE COURT: But you didn't file any suit to compel
6 this?

7 MR. BURR: I did not file a right to treatment suit,
8 no.

9 THE COURT: How come?

10 MR. BURR: At that point --

11 THE COURT: You think you just wait until you lose
12 all the appeals and you got in a situation like this, then
13 you would bring it up?

14 MR. BURR: No, Your Honor. I had no reason to
15 believe at that point that his illness would invade his
16 ability to understand his sentence of death and why he got it.
17 I had absolutely no reason to believe that. Certainly
18 looking back on it I can see that that would have been
19 something to look for and in fact, we did look for.

20 The first indication, the very first indication
21 that we had that Mr. Ford's illness crept into his ability
22 to understand his sentence of death was in October of 1983.
23 In about the middle of October Mr. Ford came out to see a
24 minister from Nashville who had been corresponding with him
25 for a number of years and had seen him occasionally, I was

1 with the minister, and at that point was the very first
2 time that I had any knowledge of Mr. Ford thinking that
3 he was no longer on Death Row. At that point in time for
4 the first time I had heard he began talking about the case
5 of Ford versus State as he calls it. And he explained that
6 Ford versus State had overturned the current death penalty
7 statute in Florida, had required that the death sentence be
8 imposed by panels of twelve judges, and that he was no
9 longer under sentence of death. In fact he was free to leave
10 the prison but that he had decided that he would stay.
11 At that point in time --

12 THE COURT: October, when, '83?

13 MR. BURR: October the 14th, '83, I believe was
14 the exact date. October of '83. Within a week thereafter we
15 did something. We invoked the statutory procedure in Florida,
16 Section 922.07 for the Governor to inquire into his competency
17 to be executed. That was the very first time that we had
18 any knowledge of his underlying psychotic processes invading
19 his ability to understand the nature and effect of the death
20 penalty.

21 At that point in time in the law we were not
22 certain whether the administrative remedy under 922.07 was
23 something that we had to follow in order to adopt our remedies
24 before moving into Federal Court or whether we could move
25 into Federal Court immediately. We determined, on the basis

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1 of what we understood the law to be then --

2 THE COURT: Go ahead.

3 MR. BURR: We determined, "we," meaning I and my
4 colleagues at the Public Defender's Office determined that
5 the safest course was to proceed through the administrative
6 remedy first prior to moving into Court so that there would
7 be no question about exhausting all available State remedies.
8 We did that. We invoked the procedure. Governor Graham
9 appointed three psychiatrists to go evaluate Mr. Ford. We
10 spoke and communicated with those psychiatrists in advance.
11 We were present at their evaluation of Mr. Ford. We were
12 provided their reports thereafter. And we filed a written
13 response to their reports. Interestingly enough though,
14 during the entire process, the Governor's office, when I
15 would make inquiries of the Governor's office as to when
16 they would like something from me or whether I would have
17 the opportunity to submit input, the Governor's Office
18 took the consistent position that we could give them whatever
19 we wanted to but they weren't sure whether they would consider
20 it or not. We did have the opportunity in November after we
21 had invoked the procedure, but before the Governor's
22 psychiatrists saw Mr. Ford, we had the opportunity for Mr.
23 Ford to see Doctor Kaufman and Doctor Kaufman prepared a
24 report which we provided to the Governor and to the
25 psychiatrists that he appointed. We, I believe, submitted

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1 to the Governor in writing, again not knowing whether it
2 would be even read or not. At the end of February, 1st of
3 March of 1984, and about a month later -- I'm sorry, two
4 months later on April the 30th, Governor Graham answered
5 the question posed by 922.07 by signing the death warrant
6 which represents his conclusion of that proceeding.

7 At that point we knew that we needed to move into
8 Court and we moved into Court as quickly as we were able.
9 The circumstance that intervened between April 30th and the
10 middle of May was our representation of another client,
11 James Adams, who was ultimately executed and for whose case
12 our entire capital staff was working on that case.

13 So that's the sequence of events. If there is
14 any questions I submit about the factual representation that
15 I make, that I have made in this argument, seems to me the
16 only proper way to resolve that is for me to be sworn as a
17 witness and questioned and to answer under oath because it is
18 a factual question and I, as the person in this office who
19 has had the ongoing contact with Mr. Ford and the person
20 that is uniquely possessed of the knowledge upon which our
21 office acted or should have acted on behalf of Mr. Ford.

22 With that as the factual background, the question
23 of abuse of the writ comes into this. Abuse of the writ,
24 as the Court knows, applies to a successive petition which
25 raises an issue that could have been raised in the first

1 petition but was not. If there is such a situation, abuse
2 of the writ would be found. The law is very clear on that
3 and well settled. The law is equally well settled that if
4 there is no factual basis to raise a claim there can be no
5 abuse of the writ if the factual basis arises after the 1st
6 proceedings and that is precisely where we are here.
7 The factual basis was not available before October of 1983
8 and at that point in time the case had left the Court, had
9 gone through the U.S. Court of Appeals and had had certiorari
10 denied in the U.S. Supreme Court. There was a limited
11 remand pending between October and March of 1984 limited to
12 a single narrow question which the Court has already now
13 disposed of. We did not think we had any opportunity to
14 supplement that proceeding because it was the mandate that
15 had issued had limited the remand to the single issue under
16 Barclay.

17 So with that analysis, we submit there is no
18 question of abuse of the writ. Claims could not have been
19 raised, if the facts which we have alleged in support of
20 our claim are true could not have been raised. The claim
21 did not arise until after the first proceeding was entirely
22 complete.

23 The next question that comes is if abuse of the
24 writ is not a bar, then is there any other procedural bar
25 for this claim? We submit there is none.

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1 The State has argued the question of delay. The
2 only delay issue, however, which can be considered in Federal
3 habeas corpus is the issue of delay described in Rule 95
4 of the Rules describing habeas proceedings under Section 2254.
5 That Rule incorporates the traditional Laches rule from
6 equity. And the critical factor there is that the State be
7 able to show in order to have benefit of that Rule of delay,
8 that the State be able to show that the delay has prejudiced
9 its ability to defend on the merits of the issue presented.
10 The State has made no suggestion that the short delay between
11 October and May has prejudiced their ability to defend against
12 the merits of this issue at all. So where does that leave us?
13 That leaves us with no abuse, with no delay and with the
14 State in the middle saying somehow this has to stop, these
15 eve of execution applications have got to be put under wraps
16 and done away with and you have to find either abuse or
17 delay or some sort of equitable remedy barring the consideration
18 of this issue. We submit there is none. There is abuse of
19 the writ and there is delay. And those are the only two
20 matters under the Federal habeas statute that can preclude
21 the Court's ruling on the merits that is as Federal matter.
22 Obviously there's procedural default, but that's not material
23 to this issue.

24 So we submit that the Court has no option but to
25 go to the merits, and I'd like to defer to one of my colleagues

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1 THE COURT: Very well.

2 MR. GREENE: Thank you.

3 MS. SHEARER: With the Court's permission, we will
4 divide our responses. Mrs. Brill will lead the argument on
5 abuse of the writ.

6 THE COURT: Petitioner took 54 minutes. I assume
7 the State will take no more than that.

8 Your name is what, ma'am?

9 MS. BRILL: My name is Penny Brill, Your Honor.

10 I'd like to start off with the abuse of the writ
11 argument and I'm going to apply it to all the claims that
12 were raised in this particular petition.

13 I think to start with let's look at the background
14 of abuse of the writ. I think the Fifth Circuit opinion in
15 Jones versus Estelle is a very well reasoned opinion. It
16 gives the Court background on when abuse of the writ should
17 be applied. Jones versus Estelle talks about abuse of the
18 writ boils down to whether or not Petitioner can excuse his
19 admission of claim from an earlier writ by proving he did
20 not know of the new claims when the earlier writ was filed
21 and we give examples when there has been a change in the law
22 for development in the facts which was and I stress reasonably
23 knowable before.

24 It is the State's position, and we are not
25 disputing the facts presented by Petitioner here, that's

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1 one reason why there is no reason to have evidentiary hearing
2 on abuse of the writ. We are only disputing the interpreta-
3 tion of facts, and I don't think you need an evidentiary
4 hearing for a dispute on the interpretation of facts.

5 I think also when you are talking about abuse of
6 the writ, the Courts have recently added perhaps another
7 element to abuse of the writ; that is the timing of the
8 second petition. The Court in Autry versus Estelle as cited
9 in the response and I think in Woodard versus Hutchins,
10 Justice Powell talking for the majority of the United States
11 Supreme Court said, and again it's important to know that
12 Woodard versus Hutchins involved a claim of insanity again
13 at the time of execution but there were new facts which had
14 arisen from the time of trial to the time of execution which
15 Mr. Woodard is now insane. Justice Powell said "This is
16 another capital case in which a last minute application for
17 stay of execution and new petition for habeas corpus relief
18 has been filed with no explanation as to why the claims were
19 not raised earlier or why they were not raised in one petition.
20 It is another example of abuse of the writ." So I think from
21 reading that you can read the interpretation that one of the
22 factors to consider in whether or not there has been abuse of
23 the writ is the timing of the second petition; and that is
24 what the State is relying on.

25 I want to make it clear we are not arguing delay

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FORT LAUDERDALE, FLORIDA

1 as Petitioner has set out. Delay only insomuch as the timing
2 of the second petition, not because we cannot respond on the
3 merits.

4 I'd like to go over the facts just from the
5 Defendant's own pleading in this particular case. This is
6 quoting from Petitioner's petition itself:

7 "On December 5, 1981, Mr. Ford's health and normalcy
8 began to give way." This is at Page 13 in the petition.
9 "By February 28, 1982, Mr. Ford's" --

10 THE COURT: December 5th was the first day of
11 hearing.

12 MS. BRILL: That's correct, Your Honor. That's why
13 I'm quoting. I'm quoting from the Petitioner, from Counsel's
14 own words; so we are not talking about disputive facts.
15 These are his own words that are in his petition.

16 At Page 13 he says that "His health and normalcy
17 began to give way. Then by February 28, 1982, Mr. Ford's
18 delusional system had taken a quantum leap." This is at
19 Page 16. "By April 17, 1982, Petitioner showed some
20 further advance in his delusional systems accompanied by
21 the injection of paranoia into his delusions as well as the
22 re-emergence of his loosening of associations. By July 8,
23 1982, Mr. Ford's remission ended." And he goes on later
24 at Page 31, "By September 11, 1982, Mr. Ford's delusional
25 system had become all-pervasive and all-encompassing. There

41
1 has been no remissions from the grip of the delusion, the
2 loosening of associations and the hallucinations since then.
3 Then on September 12, 1982, three new aspects to the delusion
4 emerged." That is at Page 37. Then at Page 39 Petitioner
5 alleged, "On October 22, 1982, Mr. Ford began to report
6 yet another new development in his delusion, one that, over
7 the course of the next year and beyond, would become the
8 most significant element in his world of delusions -- the
9 taking of hostages by the persons who were already tormenting
10 him at Florida State Prison. Then by May 10th, 1983, Mr.
11 Ford's delusions became increasingly grandiose, a new element
12 entered the delusions. Then, in the last letter available
13 from Mr. Ford on November 28, 1983, "Petitioner alleges at
14 Page 53 of the Petition, "That Mr. Ford was still grandiose,
15 but his delusional systems seem to have changed significantly
16 in content. His form of communication was becoming quite
17 esoteric and incoherent, as commonly occurs in severely
18 psychotic individuals."

19 Thus, it is the State's position from Counsel's own
20 words which are in the petition that there were facts which
21 were available to his support in good faith assertion as to
22 the Petitioner's mental capacity to be executed. This is
23 long before October 20, 1983, when he invoked the procedures
24 under 922.07.

25 I think it is important to remember the issue in

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1 the case is not the issue of the Petitioner's competency in
2 fact; but the issue is whether or not he is entitled to,
3 procedurally entitled to judicial determination of competency
4 as opposed to being forced to rely solely on the Governor's
5 determination.

6 Now Counsel has not given any reason why he could
7 not have brought forth back in, let's take from December,
8 from the day when the Governor appointed the three psychiatrists
9 who all found Mr. Ford competent to be executed, why he
10 couldn't at that point, from December 1983 until he finally
11 files some sort of petition in State Court on May 21, 1984,
12 ten days before his execution, he could not have filed some
13 sort of proceedings in State Court and then into the Federal
14 Court asking that he should have judicial determination of
15 his competency. This is never done until ten days before
16 the execution.

17 THE COURT: December of '83 was when the examination
18 was.

19 MS. BRILL: Yes. And I believe within a couple of
20 weeks after that all three psychiatrists had reported that
21 Mr. Ford was competent and understood the reasons that he was
22 to be executed and reasons why he was to be executed. And
23 from that point on Counsel never did anything to bring this
24 issue to the attention of any Court in the State's system
25 or in the Federal system until May 21, ten days before Mr.

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UNITED STATES DISTRICT COURT
FORT LAUDERDALE, FLORIDA

1 Ford's scheduled execution.

2 Furthermore, I think it's important to note some
3 additional history. After the Defendant initially filed
4 his first habeas petition in this Court on December 2nd,
5 1981 and this Court denied the petition on December 7th
6 entering your written order on December 10th, the case then
7 progressed to the Eleventh Circuit, through the panel decision
8 and the en banc decision which was rendered by the Eleventh
9 Circuit on January 7, 1983; and in that order of January 7,
10 1983 there was an order for remand to remand this case back
11 on the Barclay issue. Now at that time according to
12 Petitioner's own statements Mr. Ford was suffering under some
13 very heavy delusions at this point in January of 1983. Yet
14 Counsel never asked the Eleventh Circuit in that remand
15 can we add an additional claim as to his competency to be
16 executed. He moved for a re-hearing in the Eleventh Circuit,
17 I believe, on January 28th, but in that new motion for re-
18 hearing of the en banc decision, he never asked for it, to
19 have that, the remand to this Court, expanded to include
20 other claims that have since arisen. And I think the facts
21 certainly by then were available for Counsel to have done so.
22 And especially I think that that idea of asking the Court
23 or having this Court take jurisdiction over the new claims
24 is supported by the Eleventh Circuit's recent decision in
25 Thompson versus Wainwright which is at 714 F 2d 1495 and

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FORT LAUDERDALE, FLORIDA

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1 Arango versus Wainwright, which I had cited in the response.
2 In both those cases the Eleventh Circuit has held that
3 the District Court has the authority to continue a case
4 to allow petitioners to either amend the petition, file a
5 second petition, consolidate them, and leaving that petition
6 dormant on the district court docket while the Petitioner
7 goes back to exhaust the State remedies. So he could have
8 done that. But he didn't. Instead his claim is dormant,
9 stays quiet until ten days before the execution.

10 I think the instruction in Goode versus Wainwright
11 in the Eleventh Circuit is applicable here. In Goode the
12 Court said that a showing of changed conditions does not
13 mean that post-conviction insanity can be held back of an
14 issue until the eve of execution and then raised for the first
15 time. And again in Hutchings versus Woodard the Supreme
16 Court stated that a pattern seems to be developing in capital
17 cases of multiple review in which claims could have been
18 presented years ago or brought forth or in piecemeal fashion
19 only after the execution date is set or becomes imminent.
20 Federal Courts should not continue to tolerate even in
21 capital cases this type of abuse of the writ. And it is the
22 State's position this Court should not either.

23 As to the argument on abuse of the writ as it
24 applies to the erroneous jury instruction.

25 It is the State's position that, first off, that



JIM SMITH
Attorney General
State of Florida

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

Palm Beach County
Regional Service Center
111 Georgia Avenue
Room 204
West Palm Beach, Florida 33401

January 7, 1985

Honorable Spencer D. Mercer, Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Alvin Bernard Ford v. Louie L. Wainwright
Case No. 84-5372

Dear Mr. Mercer:

I would like to make the court aware, pursuant to Federal Rule of Appellate Procedure 28 (j) of some additional authority which has a bearing on the issues raised in the above-referenced case regarding the adequacy of the Florida gubernatorial procedure for determining post-conviction sanity in capital cases.

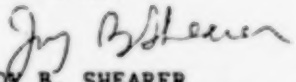
In the case of Gary Eldon Alvord, the governor followed the procedure outlined in §922.07, Florida Statutes. The appointed commission of three psychiatrists, two of whom (Ivory and Mhatre) were commissioners in Ford's case, reported to the governor that Alvord was not mentally competent under the §922.07 standard. Pursuant to this report, the governor entered an order remanding Alvord to the Florida State Hospital for the insane. I have enclosed copies of the two Executive Orders, Nos. 84-214 and 84-222.

The reason I have brought this matter to the court's attention is to further support the argument, at pages 33-38 of the Brief for Respondent/Appellee, that

Honorable Spencer D. Mercer, Clerk
Page 2
January 7, 1985

the gubernatorial proceeding is adequate to vindicate
any constitutional right not to be insane when executed.

Sincerely,


JOY B. SHEARER
Assistant Attorney General
Counsel for Respondent/Appellee

gc

Enclosure

cc: Craig S. Barnard, Esq.
Laurin A. Wollan, Jr., Esq.

State of Florida

RECEIVED

OFFICE OF THE GOVERNOR

DEC 31 1984

EXECUTIVE ORDER NUMBER 84-214

OFFICE OF
ATTORNEY GENERAL
WEST PALM BEACH, FLORIDA

(Commission to Determine Mental Competency of Inmate)

WHEREAS, the Governor has been informed that GARY ELDON ALVORD, an inmate at Florida State Prison, under sentence of death, may be insane, and

WHEREAS, pursuant to Section 922.07, Florida Statutes, it is necessary to appoint a Commission of three competent, disinterested psychiatrists to inquire into the mental condition of the aforesaid inmate, and to suspend the execution of the death sentence imposed upon said inmate during the course of the medical examination;

NOW, THEREFORE, I, BOB GRAHAM, as Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and Laws of the State of Florida, specifically Section 922.07, Florida Statutes, do hereby promulgate the following Executive Order, effective immediately:

1. The following persons, who are competent, disinterested psychiatrists, are hereby appointed as a Commission to examine the mental condition of GARY ELDON ALVORD, an inmate at Florida State Prison, pursuant to Section 922.07, Florida Statutes:

1. Peter B.C.B. Ivory, M.D.
2. Gilbert N. Ferris, M.D.
3. Dr. Umesh M. Mhatre

2. The above-named psychiatrists as and constituting the "Commission to Determine the Mental Condition of GARY ELDON ALVORD" shall examine GARY ELDON ALVORD to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him as required by Section 922.07. The examination shall take place with all three psychiatrists present at the same time. Counsel for the inmate and the State Attorney may be present but shall not participate in the examination in any adversarial manner.

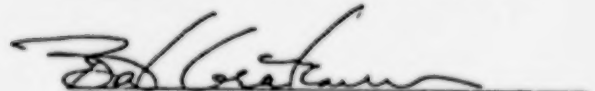
3. The psychiatric examination shall be conducted expeditiously. Upon completion of the examination, said Commission shall report to me their findings.

4. The expenses involved in this examination shall be borne by the Department of Corrections.

5. The execution of the sentence imposed upon GARY ELDON ALVORD by the Circuit Court of the 13th Judicial Circuit, Hillsborough County, on April 9, 1974, is hereby suspended pending the outcome of the examination of the mental condition of said inmate.



IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capitol, this 20th day of November, 1984.


GOVERNOR

ATTEST:


SECRETARY OF STATE

State of Florida

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER NUMBER 84-222

(Amendment of Executive Order 84-214)

WHEREAS, in accordance with the provisions of Section 922.07, Florida Statutes, Executive Order 84-214 was entered appointing three competent, disinterested psychiatrists (the "Commission") to examine the mental condition of GARY ELDON ALVORD, an inmate at Florida State Prison under sentence of death, and

WHEREAS, the Commission has completed its examination of the said GARY ELDON ALVORD, and, in reviewing its report the Governor has determined that GARY ELDON ALVORD is not mentally competent under the terms of Section 922.07, and

WHEREAS, Section 922.07 requires that an inmate under sentence of death found to be incompetent must be committed to the state hospital for the insane until such time as the inmate is found to be competent, and

WHEREAS, there is no reason for the continuation of the Commission since the purpose for which it was created has been completed; and in accordance with Section 922.07, Florida Statutes,

NOW, THEREFORE, I, BOB GRAHAM, as Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and laws of the State of Florida, do hereby promulgate the following executive order:

1. GARY ELDON ALVORD is remanded to the Florida State Hospital for the insane at Chattahoochee where he shall be kept in secure custody.
2. Peter Ivory, M.D., Gilbert Ferris, M.D., and Umesh Mhatre, M.D., are hereby relieved of all further duties and responsibilities under Executive Order 84-214.

3. The stay of execution of the sentence imposed upon GARY ELDON ALVORD, granted by said Executive Order 84-214, remains in effect until further order pursuant to Section 922.07.



IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capitol, this 29th day of November, 1984.

GOVERNOR

ATTEST:

SECRETARY OF STATE

EDITOR'S NOTE

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No. 85-5542 (4)

Supreme Court, Fla.
FILED
NOV 7 1985
JOSEPH P. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

=====

ALVIN BERNARD FORD, OR CONNIE FORD
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent.

=====

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S BRIEF IN REPLY
TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

=====

ALVIN BERNARD FORD, OR CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent.

=====

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S BRIEF IN REPLY
TO RESPONDENT'S BRIEF IN OPPOSITION

In his Brief in Opposition respondent argues that certiorari should not be granted for three reasons: the interest in being spared from execution when incompetent is not a right; the treatment of this interest as a right would be an invitation to never-ending litigation; and counsel's assertion of this claim on behalf of Mr. Ford "only ten days" prior to execution amounts to an abuse of the writ. None of these arguments detracts from the reasons presented in the petition for granting the writ of certiorari, however, for none has merit.

Respondent argues that the interest in being spared from execution when incompetent is not a right entitled to due process protection -- it is simply "a matter for the executive or the prisoner's custodian to determine, for humanitarian reasons." However, respondent does not base this argument upon an accurate analysis of "the nature of the interest at stake," Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (emphasis in original). Instead, respondent simply characterizes the interest -- as "akin to [the interest in] clemency" and as "based upon public will and a sense of propriety ... for humanitarian reasons," Respondent's Brief at 9, 11 -- without any reference to the provisions of

Florida law that have given rise to this interest. By these characterizations, respondent argues that the interest in being spared from execution when incompetent is merely a hope in the condemned that the humane discretion of the governor will be exercised in his favor.

This unfounded, and from respondent's perspective wishful, characterization breaks down when the nature of the interest is analyzed in the way the Court has analyzed other state-created interests. The Court looks to the actual language of the state courts and state legislature which created the interest. See, e.g., Hewitt v. Helms, 459 U.S. 460, 471-72 (1983); Vitek v. Jones, 445 U.S. 480, 489-90 (1980); Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979). Where such language mandates a particular course of state action upon the existence of specified factual predicates, the individual interest created or protected thereby is an entitlement that is protected by the Due Process Clause. Hewitt, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); Greenholtz, 442 U.S. at 10 (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual").

When analyzed as the Court has taught that it should be, the interest of the condemned in Florida in being spared from execution when incompetent is precisely the kind of interest that has routinely been held to be a state-created entitlement. If the factual predicate of incompetency is demonstrated in Florida, state law mandates that the condemned person's execution be stayed during the period of incompetency. The present statute governing competency at the time of execution sets out this rule:

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person....

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity [whereupon the Governor shall appoint a new commission of psychiatrists].

Section 922.07(1),(3),(4), Florida Statutes (1983) (emphasis supplied). Court decisions in Florida have followed the same rule for at least sixty years. See, e.g., Ex parte Chesser, 93 Fla. 590, 112 So. 87, 89 (1927) (when a person is condemned to die, "if, after judgment, he becomes of nonsane memory, execution shall be stayed"); State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 465-67, 152 So. 207, 211 (1933) ("the rule at common law is well settled that a person while insane cannot be tried, sentenced, nor executed"); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939) (if prisoner is "found to be insane, an appropriate order should be made for his custody until his return to sanity is appropriately adjudicated when the sentence should be executed"); Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984) ("[w]e agree with [Goode's] contention that an insane person cannot be executed"). Florida has thus created an entitlement -- not a "mere hope," Greenholtz, 442 U.S. at 11 -- that one will be spared from execution if incompetent.

Respondent's argument that the interest in being spared from execution when incompetent is not a right, accordingly, has no support in Florida law. While the law in other states may permit the interest to be characterized as a "mere hope" that the governor will decide to spare the incompetent from execution, the law of Florida does not.¹

¹ In this context, it is worth noting that the state-created interest under consideration in Solesbee v. Balkcom, 339 U.S. 9 (1950), could properly have been analyzed as a mere hope for humane disposition. Significantly, Georgia's statute at that time -- in contrast to Florida law -- did not require the governor to have the condemned examined upon a showing of incompetency or even to stay the execution upon determining that the condemned was incompetent. Disposition was wholly within the discretion of the governor:

Upon satisfactory evidence being offered to the

In addition to arguing that the interest in being spared from execution is not a right, respondent argues that it should not be treated as a right for fear of opening up "never-ending litigation" over competency. The argument is premised upon the condemned having the opportunity to begin a new proceeding after once litigating his competency, on the basis that "his condition had significantly worsened so the prior holding [of competency] was no longer accurate." Respondent's Brief at 12.

This argument is nothing more than a plea to passion rather than reason. First, it asserts that counsel for the condemned do not operate within the ethical constraints that bind all the members of our profession -- that counsel for the condemned will assert competency claims known to be frivolous as a means of avoiding execution. Such an accusation is grave and should not be made in the absence of proof. Respondent has cited no proof, and there is none.² Second, the argument blatantly ignores the capacity of the courts to prevent such abuses. The doctrine of

Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; ... and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force.

Solesbee v. Balkcom, 205 Ga. 122, 52 S.E.2d 433, 435 (Ga. 1949) (quoting § 27-2602, Georgia Code) (emphasis supplied). In order to emphasize that the Due Process Clause did not apply to a Georgia inmate's interest in being spared from execution when incompetent, the Georgia Supreme Court contrasted that interest with the interest of a California inmate created by § 1367 of the California Penal Code, which provided that "[a] person cannot be ... punished for a public offense, while he is insane." 52 S.E. 2d at 437. Recognizing that this provision of California law (which is identical to Florida law) conferred "an absolute right ... upon the condemned person," the Georgia court reasoned, "To protect this right the due-process clause of the Constitution may be invoked." Id. By contrast, the court concluded, "[T]he State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he has no such right..." Id.

² As we have noted in the petition, incompetency has been alleged in a total of only four cases among the 118 cases in which Governor Graham has signed death warrants. Further, even after Mr. Ford's case made competency a "current" issue, the issue has been raised in only two cases, despite the issuance of 38 death warrants during that period of time.

law of the case prevents relitigation of issues already settled in the same case. That doctrine is independently applicable in habeas cases, and it also informs the rule barring successive petitions which seek to relitigate issues already decided. These doctrines would obviously permit summary dismissal and final disposition of a second competency claim in the same case within the period covered by a death warrant in Florida, unless the mental status of the condemned has so substantially deteriorated since the first claim as to warrant plenary redetermination. In this event, both the law of the case doctrine, see, e.g., Westbrook v. Zant, 743 F.2d 764, 768-69 (11th Cir. 1984); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967), and the successive habeas rule, see, e.g., Sanders v. United States, 373 U.S. 1, 15-17 (1963), would permit relitigation. The need for finality is tempered by the demands of equity in our system of justice, and this principle is applicable in all cases -- civil and criminal, capital and noncapital.

Finally, respondent argues that Mr. Ford has abused the writ and thus should not have his case reviewed even if the merits warrant review. Respondent's claim of abuse rests upon the following: "Petitioner's counsel were well aware of his condition and yet never approached a court until ten days prior to his execution." Respondent's Brief at 13. By analogizing Mr. Ford's circumstances to those presented in Hutchins v. Woodard, ___ U.S. ___, 104 S.Ct. 752 (1984), respondent argues as well that Mr. Ford provided "no explanation as to why the claims were not raised earlier or why they were not all raised in one petition." Id. at 754. This argument is disingenuous, for it misrepresents the material facts.

The claim on behalf of Mr. Ford was by no stretch of the imagination asserted at the "last minute," nor was it asserted without explanation as to why it was not raised earlier or in the previous petition. These matters were fully aired before the Eleventh Circuit, were fully discussed in that court's stay decision, Ford v. Strickland, 734 F.2d 538, 539-40 (11th Cir.), motion to dissolve stay denied sub nom. Wainwright v. Ford,

___U.S.___, 104 S.Ct. 3498 (1984), and were decided against respondent. In sum, the facts of record, as discussed in that opinion, show: (a) that Mr. Ford was competent when his first petition was filed and decided; (b) that Mr. Ford subsequently became incompetent, and when his counsel realized he had become incompetent, immediately pursued available state remedies on behalf of Mr. Ford; (c) that Mr. Ford pursued his state remedies for six months thereafter and exhausted those remedies only when the governor signed his death warrant; and (d) that Mr. Ford was in court asserting the claim of incompetency within a few days after his warrant was signed. On these facts, fully presented at every opportunity by counsel for Mr. Ford, there is no abuse of the writ.

In conclusion, we wish to draw the Court's attention as well to an argument not advanced by respondent. Respondent has not taken issue with the argument that the Eighth Amendment prohibits execution of the incompetent. Such an omission is telling, for even at this stage of the proceedings, it is a concession to the justice of Mr. Ford's cause. Moreover, it is a concession that respondent has consistently made. Wainwright has never argued in this case that the Eighth Amendment does not forbid execution of the incompetent. Indeed, he has always recognized the great significance of this question, as reflected in his request to the Eleventh Circuit to decide it initially en banc. See Petition for Writ of Certiorari at 3.

In this light, the Court's observation that it "has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane ...," Wainwright v. Ford, 104 S.Ct. at 3498 n.*, takes on special significance. Respondent has provided no reason, nor even argument, why this determination should not now be made in Mr. Ford's case. The writ of certiorari should thus be granted.

Respectfully submitted,

RICHARD L. JORANDBY
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15th Judicial Circuit of Florida
224 Datura Street
West Palm Beach, Florida 33401
Tel: (305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

BY Richard H. Burr III
Counsel for Petitioner

Of Counsel:

LAURIN A. WOLLAN, JR.
1515 Hickory Avenue
Tallahassee, Florida 32303

CERTIFICATE OF SERVICE

I, RICHARD H. BURR III, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served a copy of Petitioner's Brief in Reply to Respondent's Brief in Opposition on counsel for respondent by depositing same in the United States Mail, first class postage prepaid to Honorable Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 32301, this 7th day of November, 1985.

Richard H. Burr III
RICHARD H. BURR III

MOTION FILED
OCT 31 1985

No. 85-5542

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Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AS AMICUS CURIAE

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29 pp

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=====7=====

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend
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ON PETITION FOR WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE

The National Association of Criminal
Defense Lawyers (NACDL) respectfully
moves, pursuant to Rule 36.3, for leave

to file the attached brief as amicus curiae in support of the petition for writ of certiorari.

1. Counsel for petitioner has consented to this filing, but counsel for respondent has refused to consent to it, necessitating this motion.

2. The NACDL is a nationwide nonprofit association of some 5,000 lawyers whose practice includes criminal defense. Its principal purpose is "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself."

3. Since Gregg v. Georgia, 428 U.S. 153 (1976), the NACDL has actively encouraged its members to undertake the difficult work of representing defendants in capital cases. Through its publications and its adjunct, the National

Criminal Defense College, the NACDL has also endeavored to train defense lawyers for this task.

4. NACDL members currently represent capital defendants in virtually every state which has an active death penalty, including Florida.

5. Through the commitment of the NACDL and its members to the representation of defendants in capital cases, NACDL members have attempted to shoulder the heavy burden of the bar to provide effective representation for persons already condemned to death, as well as for persons being tried in capital trials. Because NACDL members' commitment to representation has extended to state and federal collateral proceedings, NACDL members have experienced first-hand the inability to provide effective representation to clients who have become

incompetent before execution in states like Florida, where there is no adversarial procedure for the determination of competency at the time of execution. Without access to a procedure for the determination of competency that allows the advocacy and adversarial debate required for accurate factfinding, post-conviction counsel have not been able to fulfill their professional and ethical obligation to protect the interests of their incompetent clients.

6. The NACDL has long been concerned with removing barriers to the effective representation of criminal defendants. Because of its view that the criminal justice system functions justly only if there is effective advocacy on behalf of defendants, the NACDL requests the opportunity to address the need for removing the barriers to effective

advocacy on behalf of the incompetent whose incompetency entitles them to be spared from execution.

ACCORDINGLY, because of the NACDL's overriding concern for the effective representation of criminal defendants, and for the system of justice that depends for its integrity upon effective advocacy, the NACDL respectfully requests that it be heard through its attached brief in support of the petition for writ of certiorari.

Respectfully submitted,

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LAWYERS
Amicus Curiae

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No. 85-5542

IN THE
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ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
AS AMICUS CURIAE

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1911

WILLIAM J. BROWN, PETITIONER,

vs.
JOHN W. BROWN, RESPONDENT.

WILLIAM J. BROWN,

JOHN W. BROWN, RESPONDENT.

WILLIAM J. BROWN,

JOHN W. BROWN, RESPONDENT.

JOHN W. BROWN, RESPONDENT.

JOHN W. BROWN, RESPONDENT.

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STATE OF NEW YORK

1898

IN SENATE, JANUARY 1, 1898.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

ALBANY: J. B. LIPPINCOTT & CO., 1898.

PRINTED BY THE COMMISSIONER OF THE LAND OFFICE.

ALBANY: J. B. LIPPINCOTT & CO., 1898.

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4 W. Blackstone, <u>Commentaries on the Laws of England (1768)</u>	4,5,7
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1 M. Hale, <u>The History of the Pleas of the Crown</u> (1736)	4
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2 J. Stephen, <u>A History of the Criminal Law of England</u> (1883)	4
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U. S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WATER RESOURCES DIVISION
NORTHWEST REGION
SALT LAKE CITY, UTAH

REPLY TO: DIRECTOR, BUREAU OF LAND MANAGEMENT
DATE: 10/1/77

TO: SAC, DENVER
FROM: SAC, SALT LAKE CITY

SUBJECT: [illegible]
[illegible]

RE: [illegible]
[illegible]

1. [illegible]
2. [illegible]
3. [illegible]

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is stated in the foregoing motion.

SUMMARY OF ARGUMENT

The right of the condemned to be spared from execution when incompetent is a right of fundamental importance -- to the condemned prisoner and to the public. Whether this right is based in the Eighth Amendment or in state law, the Due Process Clause guarantees that rights of this stature be protected by consistent and reliable factfinding procedures. Florida, however, provides none of the procedures which are necessary to reduce the risk of erroneous factfinding. The Florida governor determines the competency of the condemned exclusively on the basis of the written reports of three psychiatrists whom he appoints' to evaluate the prisoner. Neither the

prisoner nor counsel for the prisoner can present opposing expert opinion, challenge the appointed psychiatrists' opinions, or submit argument on behalf of the prisoner. Twenty other states provide a procedure similar to Florida's for the determination of competency at the time of execution. Notwithstanding the relatively infrequent assertion of the right to be spared from execution when incompetent, the Constitutional significance of the right and the wholly arbitrary way in which it is enforced will cause the questions presented on behalf of Mr. Ford to arise in other cases until the Court intervenes to settle these questions. Certiorari should thus be granted.

ARGUMENT IN SUPPORT OF CERTIORARI

The right of the condemned to be spared from execution when incompetent is a right so basic to our collective concept of human dignity that it must be counted as among the fundamental rights of our citizens. From its inception the Constitution has mandated that rights of this stature be safeguarded by consistent and reliable factfinding procedures. Until now, however, the Court has not been presented with a case which required that it consider both the nature of the right to be spared from execution and the adequacy of the procedures utilized by the states to protect this right.

Review should be granted to consider these questions in Mr. Ford's case. Without such review, the right to be spared from execution when incompetent will be a right without any protection

in the State of Florida and as many as twenty other states. Further, without review, the questions presented by counsel for Mr. Ford will continue to arise in other cases as executions occur in increasing numbers in more states.

- A. The right of the condemned to be spared from execution when incompetent is a fundamental right based in the concept of human dignity

For nearly a millenium, the common law has flatly prohibited execution of the incompetent.¹ The prohibition of the common law was carried forward in the formative years of this country, see,

¹ See 2 J. Stephen, A History of the Criminal Law of England 151 (1883) (tracing this prohibition back at least to the thirteenth century); FitzHerbert, Natura Brevium 202 (1534) (quoted in Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1931-32)); E. Coke, Third Institute 6 (1644); 1 M. Hale, The History of the Pleas of the Crown 35 (1736); 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768); Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953).

e.g., 1 J. Chitty, A Practical Treatise on the Criminal Law 620 (Amer. Ed. 1819); F. Wharton, A Treatise on the Criminal Law of the United States 50 (2d Ed. 1852), and is still today adhered to with unanimity by the states which permit capital punishment. See Appendix (attached hereto).

The history of the prohibition against executing the incompetent is testimony both to its fundamental importance and to its status as a fundamental right. Its importance to the public derives from long-agreed-upon definitions of human dignity and morality: the execution of the incompetent has been prohibited for the very reason that it is "savage and inhumane," Blackstone at 24, "a miserable spectacle of extreme inhumanity and cruelty," Coke at 6, and "repugnant to the moral traditions of

Western civilization," Royal Commission on Capital Punishment at 98. From the perspective of the condemned, to have his life taken when he is unable to understand what is happening, to defend against his conviction and sentence as the law might still allow, or even to prepare for death, is a nightmarish prospect -- the reality of which has always informed the ancient rejection of execution of the insane.

Further, the unbroken and absolute mandate of the common law prohibition demonstrates that the condemned has a right -- not just a "mere hope," cf. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 10-11 (1979) -- to be spared from execution if incompetent. Historically and in present-day statutes, upon a demonstration of incompetency, a stay of execution

was and is mandatory. See, e.g., Blackstone at 394-97; Fla. Stat. § 922.07 (1), (3) (1983). Because there is a "set of facts which, if shown, mandate[s] a decision favorable to the [condemned]," Greenholtz, 442 U.S. at 10, the interest of the condemned in being spared from execution is not only a matter of fundamental human importance but also a matter of legal right.

- B. Although the right to be spared from execution when incompetent must be protected by consistent and reliable factfinding procedures, it is not so protected in Florida and many other jurisdictions, and it will not be unless the Court intervenes

Whether it is held to be an Eighth Amendment right or a state-created right, see Mr. Ford's Petition for Writ of Certiorari, the right to be spared from execution when incompetent is a right that must be protected by consistent and



reliable factfinding procedures. The Due Process Clause guarantees this degree of protection.

As counsel for Mr. Ford have demonstrated in the petition, the degree of protection required by the Due Process Clause for a particular right is the result of a balancing process which takes into account the private interest, the public interest, and the likelihood that procedural safeguards will reduce the risk of erroneous decisions. When the right to be spared from execution when incompetent is examined in this context, the private and public interest in accurate determinations of competency is paramount. Thus, procedures that decrease the risk of erroneous decision-making are mandated.



Florida, however, provides no such procedures. As Mr. Ford's petition has shown, Florida utilizes a non-adversarial "process" of determining competency in which the governor decides, solely on the basis of three appointed psychiatrists' written evaluations, whether the condemned is competent. This process does not permit the condemned to present opposing psychiatric or lay opinion, to challenge the opinion of the governor's appointed psychiatrists or the adequacy of their evaluation procedures, or even to advocate by counsel a position that differs from the opinion of the appointed psychiatrists. In short, Florida's process excludes altogether the "adversarial debate our system recognizes as essential to the truth seeking function," Gardner v. Florida, 430 U.S. 349, 359 (1977) -- a debate which is a pre-



requisite to the "most accurate determination of the truth on the issue [of competency]," Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 1096 (1985), "because there often is no single, accurate psychiatric conclusion on legal [competency] in a given case," id. In twenty other states, the process of determining the competency of the condemned is also -- like Florida's -- non-adversarial and within the executive branch.²

Accordingly, without the intervention of the Court, condemned people who may very well be incompetent will be executed in the majority of states that

² See the statutes and cases cited in the Appendix for Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Indiana, Kansas, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Rhode Island, South Carolina, Virginia, and Washington.

permit capital punishment without consistent, reliable determinations of their competency having first been made.

C. The questions presented in Mr. Ford's case will continue to arise until the Court settles these questions

The right of the condemned to be spared from execution when incompetent is not frequently asserted.³ However, as infrequent as the assertion of the right may be, two facts remain: a small number of people on death row will become incompetent before they are executed, see, e.g., R. Johnson, *Condemned to Die: Under Sentence of Death* (1981), and most of these people will not have their competency reliably determined -- despite

³ In the nearly seven-year tenure of Governor Graham in Florida, during which 116 death warrants have been signed, the right has been asserted on only four occasions: in the cases of Arthur Goode, Mr. Ford, Carl Jackson, and Gary Alvord.



the mandate of the Constitution -- unless the Court intervenes. Moreover, as executions begin to occur in more jurisdictions, the number of people nationally who assert the right to be spared from execution because of incompetency will increase. Accordingly, the questions presented in Mr. Ford's petition will continue to arise until the Court settles these questions.

The Court's consideration of certiorari in Mr. Ford's case should be governed by these realities, not by speculation over the specter of "floodgates" that may be opened if certiorari is granted.⁴ Certiorari should thus be

⁴ Throughout the proceedings below, the State of Florida has argued that if Mr. Ford's claim is valid, the floodgates will open to frivolous assertions of incompetency at the time of execution. The same specter has been raised for centuries, but it has consistently been rejected because of the courts' capacity to deal with the "differences between pretenses and realities." Hawles, Remarks on the Trial of Mr. Charles

granted to make clear to all the states the right of the condemned to a reliable determination of competency if his competency is drawn into question prior to execution.

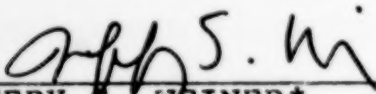
CONCLUSION

For these reasons, as well as those set forth by counsel for Mr. Ford, the National Association of Criminal Defense Lawyers urges the Court to grant certiorari in Mr. Ford's case.

Bateman, 11 State Trials 474, 478 (1816). Further, during the time that Mr. Ford's case has had high visibility -- between May 30, 1984 when his execution was stayed and the present -- the claim of incompetency at execution has been raised in only two of the thirty-six cases in which the Florida governor has signed death warrants. If there were any floodgates to open, Ford has provided a substantial opportunity for them to open, and they have not. Thus, the fear of a flood of frivolous claims should be given no more credence now than it has ever been given.



Respectfully submitted,



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Amicus Curiae

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A P P E N D I X

EXECUTION OF THE INCOMPETENT:

A National Survey of State Policies

1. Explicit statutory proscription
against execution of incompetent:

ALABAMA	.....	Code (1981) §15-16-23
ARIZONA	.....	Rev. Stat. Ann. (1982) §13.4021 et seq.
ARKANSAS	.....	Stat. Ann. (1977) §43.2622
CALIFORNIA	...	Penal Code (1979) §3700 et seq.
CONNECTICUT	..	Gen. Stat. (1980) §54-101
FLORIDA	.....	Statutes (1983) §922.07
GEORGIA	.....	Code Ann. (1982) §17-10-60 et seq.
ILLINOIS	.....	Rev. Stat. (1982) Ch. 38, §1005-2-3
KANSAS	.....	Stat. (Supp. 1981) §22-4006
MARYLAND	.....	Ann. Code (1983 Cum. Supp.) Art. 27, §75
MASSACHUSETTS		Gen. Laws Ann. (1984 Supp.) Ch. 279 §62

MISSISSIPPI .. Code Ann. (1983 Supp.)
 §99-19-57

 MISSOURI Rev. Stat. (1983 Supp.)
 §552.060

 MONTANA Code Ann. (1983)
 §46-19-201 et seq.

 NEBRASKA Rev. Stat. (1979)
 §29.2537 et seq.

 NEVADA Rev. Stat. (1983)
 §176.425 et seq.

 NEW MEXICO ... Stat. Ann. (1978)
 §31-14-4 et seq.

 NEW YORK Correc. Law
 (1983 Supp.)
 §655 et seq.

 OHIO Rev.Code Ann.
 (1982 Supp.)
 §2949.28 et seq.

 OKLAHOMA Stat.Ann. (1983)
 Title 22, §1004
 et seq.

 UTAH Code Ann. (1982)-
 §77-19-13

 WYOMING Stat. §7-13-901
 et seq.
 (1984 Cum. Supp.)

2. Judicial adoption of common law
rule proscribing execution of the
incompetent:

LOUISIANA State v. Allen,
204 La. 513, 515,
15 So.2d 870-71
(1943)

PENNSYLVANIA .Commonwealth v. Moon,
383 Pa. 18
117 A.2d 96 (1955)

TENNESSEE Jordan v. State,
124 Tenn. 81,
135 S.W. 327, 329-30
(1910)

WASHINGTON ... State v. Davis,
6 Wash. 2d 696,
108 P.2d 641, 651
(1940)(dictum)

3. General statutory procedures
requiring transfer of incompetent
prisoners to state mental hospital:

DELAWARE Code Ann. (1982)
§11-406

INDIANA Code Ann. (1983)
§11-10-4-1 et seq.

NORTH CAROLINA Gen.Stat. (1983)
§15A-1001

SOUTH CAROLINA Code Ann. §44-23-210
et seq. (1983 Supp.)

VIRGINIA Code (1983)
§19.2.177

NOTE:

-- Nine states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota North Dakota, West Virginia, Wisconsin) have no death penalty

-- Three states (Idaho, New Hampshire, Rhode Island) have a death penalty, but no case law or statute relating to execution of insane prisoners.

-- Four states (Colorado, Kentucky, New Jersey, and Texas) have recently repealed applicable provisions, leaving case law which supports the common law proscription of execution of insane prisoners. See Bulger v. People, 61 Colo. 187, 156 P. 800 (1916); Barrett v. Commonwealth, 202 Ky. 153, 259 S.W. 25 (1923); In re Lang, 77 N.J.L., 207, 71 A.47 (1908); Ex parte Morris, 96 Tex. Cr. R. 256, 257 S.W. 844 (1924).

-- Three states (Oregon, South Dakota, Vermont) were undetermined.

SUMMARY: OVERALL CATEGORIES

Explicit statutory proscription	22
Judicial adoption of common law	4
Statutory procedure applying to "any" prisoner	5
No case law or statute (but yes a death penalty)	3
Repealed statutes, leaving common law	4
No death penalty	9
Undetermined	3
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METHOD OF STUDY: This survey includes an examination of statutory and case law in each of the fifty states from 1895-present.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND
BRIEF OF THE OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE AND THE MENTAL HEALTH ASSOCIATION
OF FLORIDA AS AMICI CURIAE

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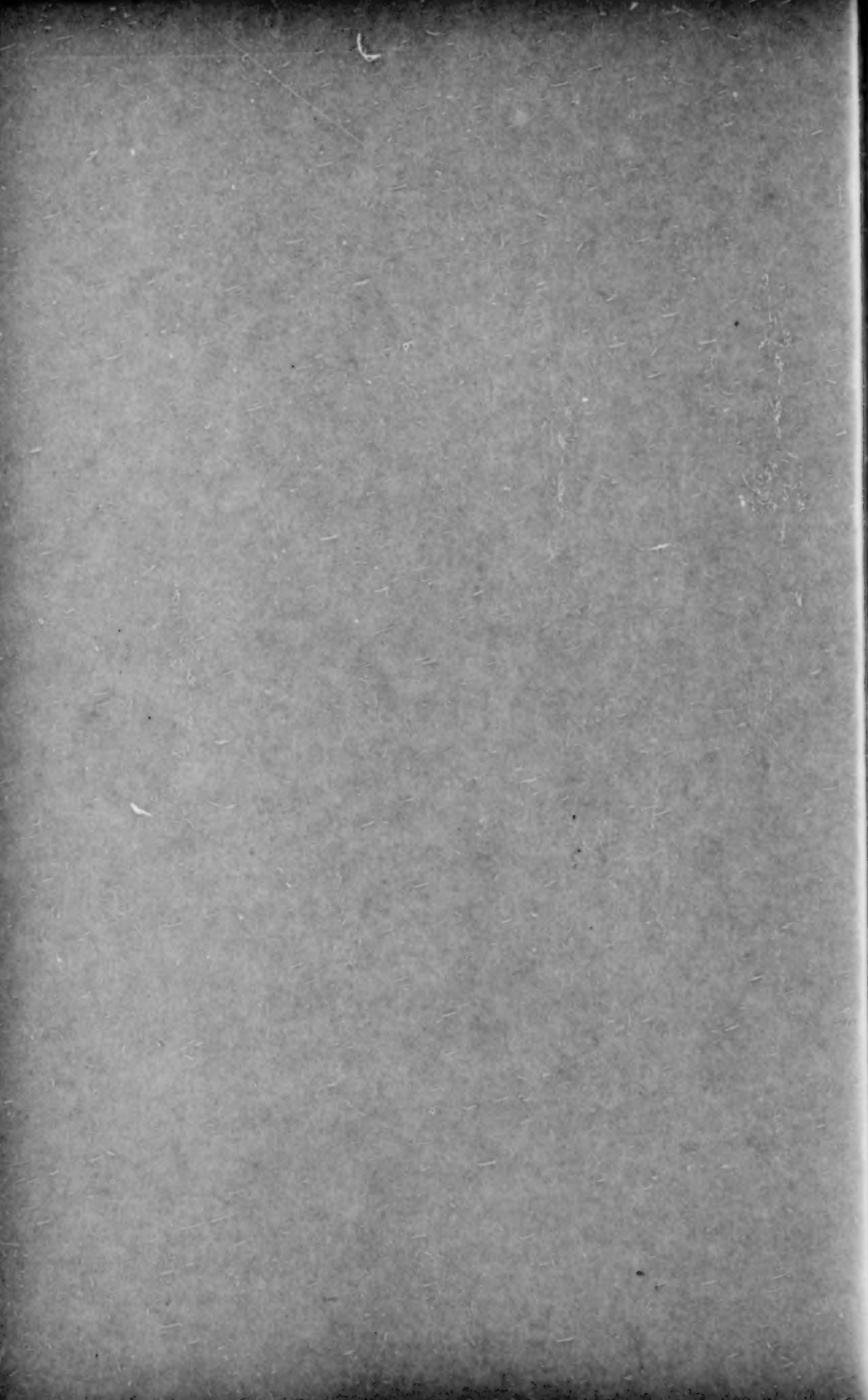


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MENTAL HEALTH ASSOCIATION OF FLORIDA
FOR LEAVE TO FILE AMICUS CURIAE BRIEF

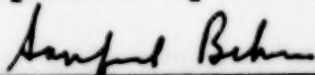
Pursuant to Rule 36.3 of the Rules of this Court, the Office of the Capital Collateral Representative for the State of Florida (hereafter "CCR") and the Mental Health Association of Florida (hereafter "MHFA") move for leave to file the attached brief as amici curiae.

The reasons supporting the granting of this motion and the issues which amici are uniquely qualified to address are set forth in the statement of interest of amici in the attached brief.

Petitioner has consented to the filing of this brief, and his letter is being filed with the Clerk of this Court. Consent was requested of respondent, but was denied. Amici respectfully submit that they

have important, relevant, and expert information to contribute to the Court that will be useful in deciding this case, and that will not be provided by the parties.

Respectfully submitted,



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October 31, 1984

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THE INTERESTS OF THE OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE FOR THE STATE
OF FLORIDA AND THE MENTAL HEALTH ASSOCIATION
OF FLORIDA

The Office of the Capital Collateral Representative for the State of Florida (CCR) was created by the Florida Legislature, effective July 1, 1985, in response to the compelling need for representation in post-conviction proceeding for indigent prisoners sentenced to death. That the legislation establishing CCR had the vigorous support of the Attorney General of Florida and passed both houses of the Legislature unanimously indicates how widely the problem of non-availability of counsel was recognized.

This new State agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in State or Federal

courts after direct appellate proceedings are concluded and the conviction and sentence have been affirmed.

As the State agency expressly responsible -- under a limited budget -- for representing all indigent Florida prisoners under sentence of death, CCR has a critical interest in the establishment of appropriate guidelines for affording procedural due process protections for its clients who may have become insane while facing execution.

The Mental Health Association of Florida, a non-profit corporation, works for improved research, prevention, detection, and treatment of mental illness. Its members include clients of mental health services, their families, and other interested citizens.

MHAF has a clear interest in this case for two reasons. First, some of its members

receive mental health treatment and are potentially vulnerable to conviction, sentence, and execution even while being treated. Second, MHAF adopted a policy statement in 1984 on the mental capacity to be executed, opposing the execution of anyone lacking it, opposing the appointment of government psychiatrists to determine it, and endorsing judicial determination of it. MHAF, having lent its expertise to bring this issue to the public's attention, is eager that it be resolved favorably in this Court.

FACTS

Amici adopt the Statement of the Case submitted by Petitioner Alvin Ford in his Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The reliance by the Eleventh Circuit on Solesbee v. Balkcom, 339 U.S. 9 (1950), in upholding Section 922.07 of the Florida Statutes was misplaced, because Solesbee is at worst no longer good law and at best inapplicable to Section 922.07. Condemned prisoners suffering from insanity must be accorded certain procedural due process protections, including effective counsel, timely access to mental examiners' reports, evidentiary hearings, and judicial review.

Irrespective of whether the Eighth Amendment prohibits execution of the insane, the Fourteenth Amendment requires that the fundamental elements of procedural due process be provided when a State creates a right not to be executed while insane. Thirty-six states that impose the death penalty afford

the condemned person the right not to be executed while insane.^{1/} Yet some, like Florida, provide little or no procedural protections in making that determination. In short, the states and their highest courts are in hopeless conflict about the procedural due process to be accorded the condemned person in the determination of whether he is insane. To compound the problem, the Eleventh Circuit, while holding that no procedural due process is required, relied, for all practical purposes, solely on an opinion of this Court that is no longer good law. The Eleventh Circuit has practically invited review: "If our application of Solesbee [v. Balkcom, 339 U.S. 9 (1950)] and Goode [v. Wainwright, 448 So.2d 999 (Fla. 1984)] is to be altered, it must be done by the Supreme

^{1/} See Appendix II.

Court, or at least by this court sitting en banc." Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985), reh'g en banc denied. 765 F.2d 154 (11th Cir. 1985).

In particular, the Petition should be granted for two reasons: (1) this Court's decision in Solesbee v. Balkcom, 339 U.S. 9 (1950) is simply no longer good law, and should be formally overruled, at least as it is applied to the circumstances of this case; (2) while procedural due process is a flexible concept, it requires certain minimums which were not met in this case, under Florida law and practice, and which are not met under the laws of most of the other states which still have the death penalty.

Attached to this brief as an appendix is a survey of each of the 41 states which still

have capital punishment, indicating which, if any, afford the condemned what procedural due process protections.

ARGUMENT

- I. The decision in Solesbee should be formally overruled.

The courts below held Petitioner was not denied procedural due process in the Governor's determination of his sanity. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984); Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985), reh'g en banc denied, 765 F.2d 154 (11th Cir. 1985). Recognizing that under Florida law "an insane person cannot be executed", Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984) (quoting Goode v. Wainwright, 448 So.2d 999, 1001 [Fla. 1984]), acknowledging Petitioner was denied an adversary hearing and procedure pursuant to "the

governor's publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane," Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984), and knowing the Governor never considered the report of Dr. Harold Kaufman, who found Petitioner insane, the courts nevertheless held there was no denial of due process.

The sole authority for those decisions was this Court's decision in Solesbee v. Balkcom, supra. Yet Solesbee is inapposite for four reasons. First, the facts presented here - a per se rule against advocacy on behalf of a condemned person in the determination of his sanity in the face of direct evidence of such insanity - were not present in Solesbee. "Whether this Governor declined to hear any statements on petitioner's be-

half, this record does not show." 339 U.S. at 13. Moreover, in Solesbee, this Court, with no record of any exclusion of evidence on behalf of Solesbee, assumed that governor would accept and consider all direct evidence proffered on behalf of the condemned. Thus, this Court stated it "would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases when human lives depend upon their decision." 339 U.S. at 13. In contrast, in this case Dr. Kaufman's report was not welcomed; it was not even considered.

Second, this Court in Solesbee relied heavily on a belief in the similarity between executive clemency or pardon on the one hand, and stay of execution by reason of insanity on the other. 339 U.S. at 11-12. Under Florida law, and the law of several other

states, there is no similarity. Unlike pardons or similar acts of clemency, which rest in the "sole, unrestricted, unlimited discretion" of the Governor^{2/}, Florida law flatly prohibits the Governor from executing an insane person. There is no discretion. Once insanity is determined, execution must be stayed. The relevant statute, Section 922.07(3) of the Florida Statutes, uses mandatory language: a condemned prisoner lacking capacity "shall" be committed to a mental institution until his capacity is restored. Similarly, under the common law of Florida, "one [could not] be . . . executed while insane." Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957). See also Ex parte

^{2/} Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), cert. denied, 434 U.S. 878 (1977). See also, Fla. Stat. Ann. §940 (West 1983).

Chesser. 93 Fla. 291, 111 So. 720, 721 (Fla. 1927); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939).^{3/}

The third reason why Solesbee does not apply is the law of procedural due process has changed radically since this Court's decision in Solesbee, completely eroding the principal legal foundation on which Solesbee was constructed. Solesbee was decided at a time when the procedural protections of the Due Process Clause were applicable only to "rights", not "privileges", which included the privilege not to be executed while insane. See, e.g. Ughbanks v. Armstrong, 208 U.S. 481 (1908); Escoe v. Zerbst, 295 U.S. 490 (1935). Since Solesbee was decided, this

^{3/} Ironically, the Governor as a matter of practice always holds hearings on requests for clemency, while never holding them in determination for sanity.

Court has rejected any distinction conditioning the availability of procedural due process on whether a "right" or a "privilege" exists under state law. See Shapiro v. Thompson, 394 U.S. 618 (1969). Thus, persons who have "legitimate claims of entitlement" to benefits conferred under state law have been accorded procedural due process protections since Board of Regents v. Roth, 408 U.S. 564 (1972). Due process protections no longer depend upon a determination of whether a "right" or "privilege" is extended by the state, Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970); Shapiro v. Thompson, supra. 394 U.S. at 627 n.6 (1969); and see Wolff v. McDonnell. 418 U.S. 539, 555-556 (1974); Goss v. Lopez. 419 U.S. 565, 573 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971). The mere expectation of benefit is enough to vest due process protections; whether such benefit is

a "right" or a "privilege" is irrelevant. "[W]hether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

By virtue of the state-created right not to be executed while insane, see Perkins v. Mayo, supra, and Hysler v. State, supra, Florida has thus created an interest which warrants protection under the due process clause of the Fourteenth Amendment. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Board of Regents v. Roth, 408 U.S. 564 (1972).

Finally, subsequent decisions of this Court have undercut another legal premise upon which the Solesbee holding was built. Solesbee's refusal to extend due process

protection to a post conviction sanity determination was in part based on the then recent decision in Williams v. New York, 337 U.S. 241 (1949), which held that a sentencing judge could rely upon confidential information without violating procedural due process. The Court in Gardner v. Florida, 430 U.S. 349 (1977) overruled that portion of Williams and held Gardner was denied due process when his death sentence was imposed based upon information he had no opportunity to refute or explain. 430 U.S. at 357-358, 362.^{4/} Of the two remaining cases relied

^{4/} The Court in Gardner observed that the Williams opinion itself had "recognized that the passage of time justifies a re-examination of capital sentencing procedures." In 1949, when the Williams case was decided, no significant constitutional differences between the death penalty and lesser punishments for crime had been expressly recognized by this Court." Id. at 350. But subsequent to Williams, the Court "expressly recognized that death is a different kind of punishment

upon by this Court in Solesbee, in one, Phyle v. Duffy, 334 U.S. 431 (1948), the due process questions were not decided, and upon remand, Phyle received a hearing. In the other, Nobles v. Georgia, 168 U.S. 398 (1897), the "only question" was whether due process required a jury trial in a judicial proceeding.

II. Procedural due process requires certain minimal protections which were not provided here by the State of Florida and are not provided by most of the remaining states with capital punishment.

from any other which may be imposed in this country." Id. Gardner thus substantially undercut the reasoning of both Williams and Solesbee by stating that the constitutional developments in the area of capital punishment and due process require greater procedural protections for individuals convicted of capital crimes.

Recognizing that "due process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, supra. 408 U.S. at 481, and see id. at 489, Amici submit that the following minimal due process safeguards are required to be afforded by the Governor of the State of Florida or anyone else in determining whether a condemned inmate is sane and can therefore be executed:

1. A right to effective assistance of counsel at all stages of the determination process;
2. A right of access to the experts' reports submitted to the Governor or such other person who is making the sanity determination prior to the determination being made, with a corresponding and timely right to comment on, challenge, or present rebuttal evidence to those reports, including the right to retain such other expert or experts as may be appropriate;

3. An evidentiary hearing before the Governor or other person making the determination, at which the inmate is given the opportunity, after adequate notice, to present evidence, cross-examine adverse witnesses, and obtain a decision with findings of fact that are adequate to provide the basis for meaningful judicial review; and

4. Judicial review.

Set forth below are the reasons for recognition of these protections as required by the Due Process Clause.

1. A right to effective assistance of counsel should be provided at all stages of the determination process.

Any procedural due process protection would be of little value if the condemned were not afforded the right to have counsel participate throughout. The "right to be heard would be, in many cases, of little

avail if it did not comprehend the right to be heard by counsel."^{5/} That is especially true for insane prisoners, who being too unfit to assist their attorneys,^{6/} cannot be expected to proceed without them. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."^{7/}

A related consideration is when such right to counsel begins. Eight states grant

^{5/} Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 [1932]).

^{6/} Seven states (Idaho, Louisiana, Missouri, Mississippi, Montana, Oklahoma, and Utah) include in their definition of unfitness for execution the prisoner's inability to assist counsel in his own defense.

^{7/} Goldberg, supra, 397 U.S. at 268-69 (footnote omitted).

the prisoner, his counsel or next friend the right to initiate the proceedings.^{8/} A ninth, California, denies it,^{9/} but begins a sanity investigation automatically upon the scheduling of an execution.^{10/} Thus, almost three quarters of the 41 states with capital punishment do not even afford a condemned person the right to have his sanity determined, but instead put him at the mercy of the unfettered discretion of various state officials. Thus, for example, Arkansas provides that when the state penitentiary superintendent "is satisfied that there are rea-

^{8/} See Appendix I, category 1.

^{9/} Caritativo v. California, 357 U.S. 549 (1958).

^{10/} Cal. Penal Code § 3700.5 (West 1982).

sonable grounds for believing" that a condemned prisoner is insane, the superintendent may transfer him to a state hospital.^{11/} In Florida, the Governor is required to initiate the process when he or she "is informed that a person under sentence of death may be insane." Section 922.07, Florida Statutes.

2. The prisoner should be provided access to the experts' reports submitted to the Governor or such other person who is making the sanity determination prior to the determination being made, with a corresponding right to comment on, challenge, or present rebuttal evidence to those reports, including the right to retain such other expert or experts as may be appropriate.

^{11/} Ark. Stat. Ann. § 43-2622 (1977) (emphasis added).

Once the question of insanity has been raised, qualified mental examiners must be appointed to diagnose the prisoner's condition. "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the, elusive and often deceptive symptoms of insanity'. . . ." ^{12/}

Once the issue of a prisoner's sanity has been raised, the appointment of mental examiners, or the prisoner's commitment to a mental health facility for observation is mandatory in 18 states, ^{13/} including Florida,

^{12/} Ake v. Oklahoma, 470 U.S. _____, 105 S.Ct. 1087, 1095 (1985).

^{13/} California, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, North Carolina, South Carolina, South

and discretionary in six states.^{14/} Examiners in the various states include state hospital officials,^{15/} and physicians who are not necessarily psychiatrists.^{16/} Thus, of the 36 states with statutes or case law on execution of the insane, 24 recognize the importance of mental examination or observation.^{17/}

Dakota, Utah, and Virginia.

^{14/} Arkansas, Colorado, Connecticut, Georgia, Louisiana, and Rhode Island.

^{15/} Kansas, Nebraska.

^{16/} Nevada, South Dakota.

^{17/} Twelve states (Alabama, Arizona, Mississippi, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, and Wyoming) do not provide for the appointment of qualified examiners. New York permits the governor to appoint "a commission of not more than three disinterested persons." N.Y. Correct. Law § 655 (McKinney 1984).

The mental examiners must report in writing. Knowing that their findings can be scrutinized by all parties, the public, and when applicable, the decision-maker and reviewer of the decision, encourages the examiners to report fairly and accurately.^{18/} Forcing the examiners to articulate their findings further encourages accuracy.^{19/} Of the 24 states that provide condemned prisoners with mental examinations or observation, 13, not including Florida, require the examiners to report in writing.^{20/}

^{18/} Wolff v. McDonnell, 418 U.S. 539, 565 (1974).

^{19/} Cf. Goldberg, 397 U.S. at 271 ("the decision maker should state the reasons for his determination and indicate the evidence he relied on, . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law").

In Florida, while on the one hand the Governor is required to appoint experts and have reports prepared as part of his "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining [sanity or insanity]," Goode v. Wainwright, 448 So.2d at 1001, the inmate's counsel is permitted to read and perceive all the errors in the reports, yet precluded from doing anything about them. Ironically, in clemency determinations in Florida, where the inmate has no right to clemency, in contrast to the right of the insane not to be executed, it is just the opposite, and the inmate has a right to an adversarial hearing.

Finally, the condemned prisoner alleging

20/ See Appendix I, category 5.

insanity must have his own mental examiner appointed if he requests.^{21/}

"[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, . . . the inaccurate resolution of sanity issues is extremely high."^{22/}

Five states already recognize the importance of a mental examiner appointed for or retained by the prisoner during pre-execution proceedings.^{23/} If the prisoner is indigent and so requests, Illinois permits but does require the sentencing court to appoint a

^{21/} Cf. Ake v. Oklahoma, 470 U.S., 105 S. Ct. 1087 (1985).

^{22/} Id. at 1096.

^{23/} See Appendix I, category 4.

qualified expert chosen by the prisoner, to be reimbursed by the county.^{24/} In Idaho^{25/} and Montana,^{26/} the court may direct that a psychiatrist retained by the prisoner participate in the mental examination. In Utah, an alienist who has knowledge of the prisoner's mental condition may be subpoenaed to testify at the hearing.^{27/} And in Louisiana, "[T]he court order for a mental examination shall not deprive the defendant . . . of the right to an independent mental examination by

^{24/} Ill. Ann. Stat. ch. 38 ¶ 104-13(e) (Smith-Hurd 1982).

^{25/} Idaho Code § 318-211(1) (1979).

^{26/} Mont. Code Ann. § 46-4-202 (1983).

^{27/} Utah Code Ann. § 77-15-5(5).

a physician of his choice. . . ."^{28/}

3. An evidentiary hearing should be held, at which the prisoner is given the opportunity, after adequate notice, to present evidence, cross-examine adverse witnesses, and obtain a decision with findings of fact that are adequate to provide the basis for meaningful judicial review.

An adversarial evidentiary hearing,^{29/} with participation by both the state and the prisoner^{30/} through his counsel, must be held

^{28/} La. Code Crim. Proc. Ann. art. 646 (West 1981).

^{29/} Cf. Greene v. McElroy, 360 U.S. 474, 497 (1959) ("The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination. . . has found increasing strength in lengthened experience.") (quoting 5 Wigmore on Evidence [3d ed. 1940] § 1367).

^{30/} The prisoner himself should also be guaranteed the right to be present at the

to determine the prisoner's sanity. Of the 36 states with applicable statutes or case law, 11 provide such adversarial hearings.^{31/}

hearing, a right secured by three states. See Appendix I, category 7. (Twelve states at least guarantee the prisoner's counsel that right. See Appendix I, category 8.)

A major purpose of the historic prohibition on executing the insane is "peradventure, says the humanity of English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768). See Solesbee v. Balkcom, 339 U.S. 9, 17-19 (Frankfurter, J., dissenting) (citing Blackstone; 1 Hale, The History of Pleas of the Crown 34-35 [1736]; and Remarks on the Tryal of Charles Bateman by Sir John Hawles, Solicitor-General in the reign of King William III, 3 State-Tryals 651, 652-53 (1719)).

Seven states (Idaho, Louisiana, Missouri, Mississippi, Montana, Oklahoma, and Utah) include in their definition of unfitness for execution the prisoner's inability to assist counsel in his own defense. According to the same reasoning that the prisoner's sanity is a prerequisite to an effective defense, the prisoner's presence at the hearing is a prerequisite in effectively establishing his insanity.

The prisoner must be guaranteed the right to present evidence^{32/} and cross-examine adverse witnesses.^{33/} These components of a hearing are considered fundamental under procedural due process.^{34/}

^{31/} See Appendix I, category 6.

^{32/} Morrissey v. Brewer, 408 U.S. 471, 489 (1972). See also Goldberg, 397 U.S. at 267. ("The fundamental requisite of due process of law is the opportunity to be heard") (quoting Grannis v. Ordean, 234 U.S. 385, 394 [1914]).

^{33/} Morrissey, 408 U.S. at 489 (1972); see also Goldberg, 397 U.S. at 268-69 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

^{34/} See e.g., Morgan v. United States, 304 U.S. 1, 18 (1938); Greene v. McElroy, 360 U.S. 474, 497 (1959).

Twelve states allow condemned prisoners to present witnesses or evidence during sanity hearings or examinations.^{35/} Louisiana,^{36/} and apparently Ohio^{37/} and Wyoming^{38/} permit prisoner to compel attendance of witnesses. In three other states, the prisoner may summon the examining psychia-

^{35/} See Appendix I, category 6C.

^{36/} La. Code Crim. Proc. Ann. art. 644 (1981).

^{37/} Ohio Rev. Code Ann. § 2949.29 (Page 1982) ("Witnesses may be produced and examined. . . .") See In re Keaton, 19 Ohio App. 2d 254, 250 N.E. 2d 901, 903 (1969) vac'd and rem'd, 408 U.S. 936 (1972) (court allowed prisoner's counsel to present evidence).

^{38/} Wyo. Stat. § 7-13-902 ("Witnesses may be produced and examined. . . ."). Note similarity to Ohio's statute.

trists.^{39/} In a fourth state, the prisoner may also subpoena an alienist who has knowledge of his mental condition.^{40/}

Sight states provide for some form of cross-examination by the prisoner or his counsel.^{41/} Five of those states limit cross-examination to mental examiners.^{42/}

The procedure to determine if the prisoner has recovered his sanity must also have as many safeguards as the original determination of insanity. Fourteen states guarantee as many procedural protections

^{39/} See Appendix I, category 6B.

^{40/} Utah Code Ann. § 77-15-5(5) (1982).

^{41/} See Appendix I, category 6D.

^{42/} Id.

during subsequent determinations of sanity as during the original one, nine do not, and 13 are unclear.^{43/}

4. Judicial review.

The prisoner's sanity must ultimately be determined judicially by a court or jury.

Some states allow final determinations by the mental examiners or governor. Sanity is determined by mental examiners in ten states, and by the governor in three states.^{44/} In Massachusetts, it is unclear whether the governor and the executive council, two examining psychiatrists, or all of them determine sanity.^{45/} In the remaining

^{43/} See Appendix I, category 11.

^{44/} See Appendix I, category 9.

^{45/} Mass. Ann. Laws ch. 279, § 62 (Michie/

states, the determination is made by a court or jury.

Because the right to an impartial decision-maker is required by due process,"^{46/} governors should be prohibited from making final determinations of sanity.^{47/}

Law Coop. 1984 Supp.)

^{46/} Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part). See Goldberg, 397 U.S. at 271 ("of course, an impartial decision maker is essential").

^{47/} Although their input is vital, mental examiners should also not be making the final determination of sanity. "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, [and] on the appropriate diagnosis to be attached to given behavior and symptoms. . . . Perhaps because there is often no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." Ake, 470 U.S. at ____.

Of the 36 states with applicable statutes or case law on execution of the insane, 22 determine sanity judicially.^{48/}

The determination of insanity must be judicially appealable. One state allows determinations of sanity to be appealed,^{49/} ten preclude it, and the rest are unclear.^{50/}

105 S.Ct. at 1087.

^{48/} Ake. 470 U.S. at _____, 105 S.Ct. at 1096.

^{49/} Ill. Ann. Stat. Ch. 38 §104-16(e) (Smith-Hurd 1982). Mississippi permits the determination of recovery of sanity to be appealed. Miss. Code Ann. § 99-19-57 (1985 Supp.).

^{50/} See Appendix I, category 10.

CONCLUSION

Amici are not requesting this Court to impose a "code of procedure; that is the responsibility of each state."^{51/} Amici do request, however, that this Court articulate "the minimum requirements of due process ^{52/} for prisoners who become insane while awaiting capital punishment.

^{51/} Morrisey, 408 U.S. at 488.

^{52/} Morrisey, 408 U.S. at 489.

For this and the foregoing reasons,
amici respectfully request that Petitioner's
petition for a writ of certiorari be granted.

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APPENDIX I

1. May the prisoner, counsel, or next friend initiate the process?
2. Must mental examiners be appointed to determine sanity?
3. May mental examiners be state employees?
4. May the prisoner have his own examiner participate?
5. Must mental examiners report in writing?
6. Is an adversarial hearing held?
- 6A. Is the proceeding (whether or not adversarial) administrative (A) or judicial (J)?
- 6B. Is the prisoner guaranteed the right to compel attendance of witnesses?
- 6C. Is the prisoner guaranteed the right to present witnesses or evidence?
- 6D. Is the prisoner guaranteed the right to cross-examine witnesses?
7. Is the prisoner guaranteed the right to be present?
8. Is the prisoner guaranteed the right to counsel at the proceeding?

Appendix I

9. Is sanity determined by court (C), jury (J), mental examiner(s) (E), or governor (G)?
10. Is the determination of sanity appealable?
11. Does the procedure to determine recovery of sanity have as many safeguards as the original determination of insanity?
- Y = Yes
N = No
NA = Not Applicable
U = Unclear
* = State does not have death penalty.
- = State does not have applicable statute or case law.

Appendix I

	1	2	3	4	5	6	6A	6B	6C	6D	7	8	9	10	11
Alabama	N	N	NA	U	NA	N	J	N	N	N	N	N	C	N	N
Alaska	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Arizona	N	N	NA	U	NA	N	J	N	N	N	N	N	J	U	U
Arkansas	N	Y	Y	U	N	N	NA	NA	NA	NA	NA	NA	E	U	U
California	1	Y	Y	U	NA	N	J	N	N	N	N	N	J	N	N
Colorado	Y	N	Y	U	N	Y	J	U	Y	U	U	Y	C	N	Y
Connecticut	N	N	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	N
Delaware	N	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	U
Florida	N	Y	Y	N	N	N	A	N	N	NA	2	Y	G	N	Y
Georgia	N	N	Y	N	Y	N	NA	NA	NA	NA	NA	NA	G	N	N
Hawaii	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Idaho	N	Y	Y	Y	Y	Y	J	3	Y	3	2	Y	C	U	Y
Illinois	Y	Y	Y	Y	Y	Y	J	U	Y	Y	Y	Y	C	Y	Y
Indiana	Y	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	Y
Iowa	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Kansas	N	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	Y
Kentucky	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Louisiana	Y	N	Y	Y	Y	Y	J	Y	Y	3	2	Y	C	U	Y
Maine	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Maryland	N	Y	Y	N	N	N	NA	NA	NA	NA	NA	NA	G	U	Y

Appendix I

	1	2	3	4	5	6	6A	6B	6C	6D	7	8	9	10	11
Massachusetts	N	Y	Y	N	N	N	A	N	N	N	N	N	4	U	Y
Michigan	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Minnesota	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Mississippi	Y	N	NA	U	NA	N	NA	N	N	N	N	N	C	U	Y
Missouri	N	Y	Y	N	N	N	J	N	N	N	N	N	C	U	N
Montana	Y	Y	Y	Y	Y	Y	J	3	Y	3	2	Y	C	U	Y
Nebraska	N	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	Y
Nevada	N	Y	Y	U	Y	Y	J	U	Y	Y	Y	Y	C	U	N
New Hampshire	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
New Jersey	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
New Mexico	N	N	NA	U	NA	N	J	N	N	N	N	N	C	N	N
New York	N	N	N	N	N	Y	A	N	Y	U	2	Y	E	N	U
North Carolina	Y	Y	N	U	Y	Y	J	U	Y	3	Y	U	C	U	U
North Dakota	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Ohio	N	N	NA	N	NA	Y	J	Y	Y	Y	N	Y	Cor J	U	U
Oklahoma	N	N	NA	U	NA	N	J	N	N	N	N	N		J	N
Oregon	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Pennsylvania	U	U	U	U	U	U	U	U	U	U	U	U	C	U	U
Rhode Island	N	N	Y	U	N	N	J	NA	NA	NA	NA	NA	C	U	Y
South Carolina	Y	Y	Y	N	N	N	NA	NA	NA	NA	NA	NA	E	U	U
South Dakota	N	Y	Y	N	N	Y	J	N	Y	U	2	Y	E	N	Y

Appendix I

	1	2	3	4	5	6	6A	6B	6C	6D	7	8	9	10	11
Tennessee	U	U	U	U	U	U	J	U	U	U	U	U	C	U	U
Texas	N	U	U	U	U	U	J	U	U	U	U	U	C	N	U
Utah	N	Y	Y	Y	Y	Y	J	S	S	S	2	Y	C	U	U
Vermont	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Virginia	U	Y	U	U	U	N	J	NA	NA	NA	U	Y	E	U	U
Washington	N	N	U	U	U	U	J	N	N	N	N	N	C	U	U
West Virginia	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Wisconsin	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Wyoming	N	N	NA	U	NA	U	J	Y	Y	U	N	U	J	U	N

Appendix I

1. Although condemned prisoner may not initiate the process, it begins automatically 20 days before a scheduled execution.

2. Prisoner's counsel may be present at the hearing. It is unclear whether prisoner may too.

3. Prisoner may compel attendance of examining psychiatrists, and cross-examine them.

4. It is unclear who determines sanity; the governor and the executive council, two examining psychiatrists, or all of them.

5. Alienists who examined prisoner or who otherwise have knowledge of his mental condition may be subpoenaed to testify.

2381-L

Appendix I

APPENDIX II

States with applicable statutes or case law on execution of the insane.

Alabama	Ala. Code § 15-16-23 (1982)
Arizona	Ariz. Rev. Stat. Ann. 13.4021 <u>et seq.</u> (1978)
Arkansas	Ark. Stat. Ann. § 43-2622 (1977)
California	Cal. Penal Code § 3700 <u>et seq.</u> (West 1982)
Colorado	Colo. Rev. Stat. § 16-8-110 <u>et seq.</u> (1978)
Connecticut	Conn. Gen. Stat. Ann. § 54-101. (West 1985 Supp.)
Delaware	Del. Code Ann. title 11, § 406 (1979)
Florida	Fla. Stat. Ann. § 922.07 (West 1983)
Georgia	Ga. Code Ann. 27-2601 <u>et seq.</u> (1983)
Idaho	Idaho Code § 18-210 <u>et seq.</u> (1979)
Illinois	Ill. Ann. Stat. ch. 38 ¶ 1005-2-3 (Smith-Hurd 1982)

Appendix II

Indiana	Ind. Code Ann. § 11-10-4-2 <u>et seq.</u> (Burns 1981)
Kansas	Kan. Stat. Ann. § 22-4006 (1981)
Louisiana	La. Code Crim. Proc. Ann. art. 641 <u>et seq.</u> (West 1981)
Maryland	Md. Ann. Code art. 27 § 75(c) (1985 Supp.)
Massachusetts	Mass. Ann. Laws ch. 279, § 62 (Michie/ Law Coop. 1984 Supp.)
Mississippi	Miss. Code Ann. § 99-19-57 (1985 Supp.)
Missouri	Mo. Ann. Stat. § 552.060 (Vernon 1984 Supp.)
Montana	Mont. Code Ann. § 46-14-103 <u>et seq.</u> (1983)
Nebraska	Neb. Rev. Stat. § 29-2537 <u>et seq.</u> (1979)
Nevada	Nev. Rev. Stat. § 176.425 <u>et seq.</u> (1983)
New Mexico	N.M. Stat. Ann. § 31-14-3 <u>et seq.</u> (1978)
New York	N.Y. Correct. Law § 654 <u>et seq.</u> (McKinney 1984)

Appendix II

North Carolina	N.C. Gen. Stat. § 15-A-1001 <u>et seq.</u> (1983)
Ohio	Ohio Rev. Code Ann. 2949.28 <u>et seq.</u> (Page 1982)
Oklahoma	Okla. Stat. Title 22 § 1005 <u>et seq.</u> (West 1983)
Pennsylvania	<u>Commonwealth v. Moon</u> , 383 Pa. 18, 117 A.2d 96 (Penn. 1955)
Rhode Island	R.I. Gen. Laws § 40.1-5.3-6 (1984)
South Carolina	S.C. Code Ann. § 44-23-210 (Law. Co-op. 1985)
South Dakota	S.D. Codified Laws Ann. § 23A-27A-21 (1979)
Tennessee	<u>Jordan v. State</u> , 124 Tenn. 81, 135 S.W. 327 (Tenn. 1911)
Texas	<u>Ex Parte Morris</u> , 96 Tex. Crim. 256, 257 S.W. 894 (Tex. Crim. App. 1924)
Utah	Utah Code Ann. § 77-15-1 <u>et seq.</u> (1982)
Virginia	Va. Code § 19.2-177 (1983)

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Washington

State ex rel. Alfani v.
Superior Court for Grays
Harbor County 245 P. 929
(Wash. 1926); State v.
Nordstrom, 7 Wash. 506, 35
P. 382 (Wash. 1893)

Wyoming

Wyo. Stat. § 7-13-901 et seq.
(1977)

Appendix II

CERTIFICATE OF SERVICE

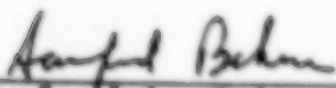
I, Sanford L. Bohrer, a member of the Bar of this Court, certify that three copies of the foregoing Motion for Leave to File and Brief of the Office of the Capital Collateral Representative and the Florida Mental Health Association as Amici Curie were served this thirty-first day of October, 1985, by mail, postage prepaid, upon the following counsel:

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Attorney for Respondent



Sanford L. Bohrer

(7)
No. 85-5542

Supreme Court, U.S.

FILED

JAN 17 1986

JOSEPH E. SPANGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually,
and as next friend on behalf of
ALVIN BERNARD FORD, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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Counsel for Respondent

PETITION FOR CERTIORARI FILED OCTOBER 1, 1985
CERTIORARI GRANTED DECEMBER 9, 1985

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**RELEVANT DOCKET ENTRIES
IN THE COURTS BELOW**

DATE	PROCEEDINGS
[Circuit Court of the Seventeenth Judicial Circuit of Florida]	
May 21, 1984	FILED: [Mr. Ford's] Motion for Hearing and Appointment of Experts for Determination of Competency To Be Executed, and for Stay of Execution During the Pendency Thereof
May 21, 1984	ORDER denying said motion
May 22, 1984	FILED: Notice of Appeal
[Supreme Court of Florida]	
May 23, 1984	FILED: Brief of Appellant [Ford] or Application for Extraordinary Relief
May 24, 1984	FILED: Answer Brief of Appellee or Response to Application for Extraordinary Relief
May 25, 1984	ORAL ARGUMENT
May 25, 1984	OPINION denying Mr. Ford's application for a hearing to determine competency
[United States District Court for the Southern District of Florida]	
May 25, 1984	FILED: Petition for Writ of Habeas Corpus
May 25, 1984	FILED: Response to Petition for Writ of Habeas Corpus
May 29, 1984	HEARING: argument on petition and request for stay of execution

DATE	PROCEEDINGS
May 29, 1984	ORDER denying Petition for Writ of Habeas Corpus and stay of execution
May 29, 1984	FILED: Notice of Appeal
	[United States Court of Appeals for the Eleventh Circuit]
May 30, 1984	ORAL ARGUMENT on Mr. Ford's application for stay of execution and for certificate of probable cause
May 30, 1984	ORDER and OPINION granting stay of execution and certificate of probable cause
	[Supreme Court of the United States]
May 31, 1984	FILED: Application of the State of Florida to Vacate Order of Eleventh Circuit Granting Stay of Execution
May 31, 1984	FILED: Response to Application of Louie L. Wainwright to Vacate Order of Eleventh Circuit Granting Stay of Execution
May 31, 1984	ORDER denying application to vacate stay of execution
	[United States Court of Appeals for the Eleventh Circuit]
July 30, 1984	FILED: Brief for Petitioner-Appellant
August 27, 1984	FILED: Brief for Respondent-Appellee
September 18, 1984	ORAL ARGUMENT
January 17, 1985	OPINION affirming the denial of habeas corpus relief
February 6, 1985	FILED: Suggestion for Rehearing En Banc

DATE	PROCEEDINGS
June 3, 1985	ORDER denying rehearing en banc
June 20, 1985	ORDER denying stay of mandate and issuing mandate
[Supreme Court of the United States]	
August 20, 1985	ORDER extending time to file petition for writ of certiorari
October 1, 1985	FILED: Petition for Writ of Certiorari
October 23, 1985	FILED: Respondent's Brief in Opposition to Petition for Writ of Certiorari
October 31, 1985	FILED: Motion of National Association of Criminal Defense Lawyers for leave to file brief as <i>amicus curiae</i>
October 31, 1985	FILED: Motion of Office of Capital Collateral Representative for the State of Florida, et al. for leave to file brief as <i>amici curiae</i>
December 9, 1985	ORDER granting petition for writ of certiorari and motions for leave to file briefs as <i>amici curiae</i>

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 74-2159cf

STATE OF FLORIDA

vs.

ALVIN BERNARD FORD, DEFENDANT

ORDER

THIS CAUSE having come on before the court upon the Defendant's Motion for Hearing and Appointment of Experts for Determination of Competency to be Executed, and for Stay of Execution During the Pendency Thereof, it is hereby

ORDERED AND ADJUDGED that the Defendant's motion be and it hereby is Denied.

DONE AND ORDERED in Chambers, Broward County, Florida, this 21st day of May, 1984.

/s/ John G. Ferris
Circuit Judge
For and at the Direction of:
J. Cail Lee, Circuit Judge

SUPREME COURT OF FLORIDA

Nos. 65335, 65343

ALVIN BERNARD FORD, or CONNIE FORD, individually, and
acting as next friend on behalf of ALVIN BERNARD
FORD, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary, Dept. of Corrections,
State of Florida, RESPONDENT

ALVIN BERNARD FORD, ETC., APPELLANT

v.

STATE OF FLORIDA, ETC., APPELLEE

May 25, 1984

ADKINS, Justice.

We have before us a petition for habeas corpus and an application for stay of execution in order to allow a hearing to determine petitioner's competency. We have jurisdiction. Art. V, § 3(b) (7), (9), Fla. Const.

The petitioner was convicted in the Circuit Court of the Seventeenth Judicial Circuit on December 17, 1974, for the first-degree murder of a Fort Lauderdale police officer. The jury recommended death, and the trial court imposed a sentence of death on January 6, 1975. This

Court affirmed petitioner's conviction and sentence of death in *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner then filed a motion to vacate or set aside the judgment pursuant to Florida Rule of Criminal Procedure 3.850. The circuit court denied the motion, and its denial was affirmed by this Court. *Ford v. State*, 407 So.2d 907 (Fla.1981).

Petitioner's subsequent petition for writ of habeas corpus was denied by the United States District Court for the Southern District of Florida. Upon appeal, a divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of relief. *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982). Rehearing en banc was granted, and the en banc court affirmed the district court's judgment. *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983). Certiorari was denied in *Ford v. Strickland*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

Thereafter proceedings to determine petitioner's mental competency were instituted pursuant to section 922.07, Florida Statutes (1983). As required by this statute, Governor Graham appointed a commission of three psychiatrists to evaluate petitioner's sanity. The reports of the psychiatrists were submitted to the Governor, and he signed a death warrant for petitioner on April 30, 1984, requiring petitioner to be executed between noon on May 25, 1984, and noon on June 1, 1984. Petitioner is currently scheduled to be executed on May 31, 1984.

In addition to the proceedings that were instituted on behalf of petitioner pursuant to section 922.07, petitioner's counsel also filed a motion in the trial court for a hearing to determine petitioner's competency and for a stay of execution during the pendency thereof. The trial court denied the motion on May 21, 1984.

Petitioner raises two issues in his petition for writ of habeas corpus. The first of these concerns a jury instruc-

tion given to the jury in the sentencing phase that its advisory verdict of either life imprisonment or death must be reached by a majority vote of the jury. Specifically, petitioner argues that intervening law has established that such an instruction is erroneous, and that but for the erroneous instruction the jury's verdict "most probably" would have been for life imprisonment.

This alleged error occurred during the sentencing proceeding in the trial court and therefore, the explicit proscription contained in Florida Rule of Criminal Procedure 3.850 applies here:

An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

In his first motion for post conviction relief in late 1981, petitioner raised other challenges to the instructions given during the sentencing phase, but did not raise this issue. Thus, petitioner is not entitled to raise the issue here. See *Johnson v. State*, 185 So.2d 466, 467 (Fla. 1966); *Finley v. State*, 394 So.2d 215, 216 (Fla. 1st DCA 1981); *Darden v. Wainwright*, 236 So.2d 139 (Fla. 2d DCA 1970).

Furthermore, petitioner's reliance on *Rose v. State*, 425 So.2d 521 (Fla.), *cert. denied*, — U.S. —, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), and *Harich v. State*, 437 So.2d 1082 (Fla.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), is misplaced. This Court has recently clarified that the error which petitioner alleges here requires an objection at trial before relief can be granted on direct appeal. See *Rembert v. State*, 445 So.2d 337, 340 (Fla.1984); *Jackson v. State*,

438 So.2d 4, 6 (Fla.1983). The excerpt from the transcript of the sentencing phase of petitioner's trial which is appended to the instant petition shows that there was no objection to the instruction in the trial court. Thus, any alleged error in the contested jury instruction has been waived by the lack of a contemporaneous objection at trial, and any relief in this proceeding is precluded by the well-established rule that habeas corpus may not be used as a vehicle to raise for the first time issues which could or should have been raised at trial and on appeal. *McCrae v. Wainwright*, 439 So.2d 868, 870 (Fla.), *cert. denied*, — U.S. —, 103 S.Ct. 2112, 77 L.Ed.2d 315 (1983); *Hargrave v. Wainwright*, 388 So.2d 1021 (Fla.1980).

Additionally, the instructions given to the jury accurately tracked the statute that was in effect at the time and that remains unchanged. It was a change in the standard jury instructions which prompted our decision in *Harich*. However, this Court has held that the *Harich* case does not constitute a change in the law which will merit relief in a collateral proceeding under the rule of *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). *Jackson*, 438 So.2d at 6.

Moreover, as we held in *Harich* and *Jackson*, the record in this case does not establish that petitioner was prejudiced by the instructions as delivered. Petitioner attempts to construct his claim of prejudice based almost entirely upon the response by one juror as the jury was being polled regarding whether the verdict was by a majority vote of the jury, one juror responded: "The second time it was." From this response petitioner reasons that initially a majority of the jury did not vote for the death penalty, and then builds to a conclusion that "the erroneous instruction was determinative of the outcome. . . ." However, it is well known that juries often take an initial vote to see where the members stand in order to channel their discussion. The mere fact that a second vote was taken does not establish anything in this record

to indicate that the jury felt compelled to reach a conclusion that they would not otherwise have reached. Petitioner's assertion to that fact is based purely upon conjecture, but this Court has stated that reversible error cannot be predicated on conjecture. See *Sullivan v. State*, 303 So.2d 632, 635 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

Petitioner's second claim in this proceeding is that the death penalty is applied in Florida in an arbitrary and discriminatory manner on the basis of race, geography, etc., in violation of the eighth and fourteenth amendments. This claim has never been raised by petitioner in a motion for post-conviction relief; therefore, it cannot be raised for the first time in this original habeas corpus proceeding. See *Johnson v. State*, 185 So.2d 466, 467 (Fla.1966); *Finley v. State*, 394 So.2d 215, 216 (Fla. 1st DCA 1981); *Darden v. Wainwright*, 236 So.2d 139 (Fla. 2d DCA 1970). Further, this same issue, based upon the same data, has been presented to and rejected by this Court in *Sullivan v. State*, 441 So.2d 609 (Fla.1983), and most recently in *Adams v. State*, 449 So.2d 819 (Fla.1984). Petitioner concedes as much, but requests that this Court reconsider its prior holdings on this issue. We decline to do so.

Petitioner's counsel has also filed a separate brief in this proceeding requesting this Court to remand for a hearing in the circuit court to determine whether petitioner is presently insane. Petitioner argues that a separate judicial determination of sanity must be made apart from the statutory procedure in section 922.07, Florida Statutes (1983), which directs the governor to make such a determination. This is so, petitioner contends, because Florida has an established common law right to a determination of a prisoner's competency to be executed. However, when the early Florida decisions held that an application to the trial court must be made for a determination of sanity, section 922.07 had not been enacted. It is an accepted rule of statutory construction that the legislature

is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute. *Main Insurance Co. v. Wiggins*, 349 So.2d 638, 642 (Fla. 1st DCA 1977); *Bermudez v. Florida Power and Light Co.*, 433 So.2d 565, 567 (Fla. 3d DCA 1983), *review denied*, 444 So.2d 416 (Fla.1984). Thus, the statutory procedure is now the exclusive procedure for determining competency to be executed.

In *Goode v. Wainwright*, 448 So.2d 999 (Fla.1984), we addressed this issue, agreed "that an insane person cannot be executed," and held that section 922.07 sets forth "the procedure to be followed when a person under sentence of death appears to be insane. The execution of capital punishment is an executive function and the legislature was authorized to prescribe the procedure to be followed by the governor in the event someone claims to be insane." Thus, in *Goode* we held that under section 922.07 the governor can make the determination; *Goode* does not stand for the proposition that the issue of sanity to be executed can be raised independently in the state judicial system. As we recognized in *Goode*, the United States Supreme Court in *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed.2d 604 (1950), has held that a procedure like Florida's whereby the governor determines the sanity of an already convicted defendant does not offend due process. Like *Goode*, the petitioner has exercised his right to use the full processes of the judicial system. Therefore, *Goode* is dispositive of the instant case.

Accordingly, petitioner's application for a hearing to determine competency and a stay of execution is hereby denied. The petition for writ of habeas corpus is also denied.

It is so ordered.

ALDERMAN, C.J., and BOYD, McDONALD and EHRLICH, JJ., concur.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

**PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY**

To the Honorable Norman C. Roettger, Jr., Judge of the District Court for the Southern District of Florida.

1. The Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida entered the judgment under attack. The Court is located in Fort Lauderdale, Florida.

2. Mr. Ford entered a plea of not guilty, and a judgment thereon was entered on December 7, 1974. After advisory sentence of death was returned by the jury, the court entered a death sentence on January 6, 1975.

3. Mr. Ford was sentenced to death by electrocution.

4. Mr. Ford was indicted for first degree murder of Dimitri Ilyankoff.

5. Mr. Ford entered a plea of not guilty.

6. Mr. Ford's trial was before a jury.

7. Mr. Ford did not testify at his trial.

8. Mr. Ford appealed his conviction and sentence.

9. The Supreme Court of Florida affirmed the conviction and death sentence on July 18, 1979, and denied rehearing on September 24, 1979. *Ford v. State*, 374 So.2d 496 (Fla. 1979). Certiorari was denied on April 14, 1980. *Ford v. Florida*, 445 U.S. 972.

10. Thereafter, Mr. Ford pursued state post-conviction and federal habeas corpus remedies. His motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 was denied by the Circuit Court in Broward County, and its denial was affirmed by the

Supreme Court of Florida. *Ford v. State*, 407 So.2d 907 (Fla. 1981). Mr. Ford's subsequent petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida was denied in an unreported opinion, and Mr. Ford appealed. On April 15, 1982, a divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of relief. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982). Rehearing en banc was granted, and the en banc court affirmed the district court's judgment. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1982). Certiorari was thereafter denied. *Ford v. Strickland*, — U.S. —, 104 S.Ct. 201 (1983).

11. On October 20, 1983, the undersigned counsel invoked the procedures of *Fla. Stat.* § 922.07 (1983) on behalf of Mr. Ford. Pursuant to this statute, Governor Graham appointed a commission of three psychiatrists to evaluate Mr. Ford's current sanity in light of the statutory standards for determining sanity at the time of execution. The commission members each thereafter reported their findings to Governor Graham, and on April 30, 1984, Governor Graham signed a Death Warrant for Mr. Ford. No findings were made by Governor Graham with respect to Mr. Ford's sanity, but the signing of the Death Warrant signified that the Governor had concluded that in his view Mr. Ford was sufficiently sane to be executed. The Death Warrant signed by Governor Graham permits the execution of Mr. Ford during the week beginning noon, Friday, May 25, 1984, and ending noon, Friday, June 1, 1984. The Superintendent of Florida State Prison has scheduled Mr. Ford's execution for Thursday, May 31, 1984, at 7:00 a.m.

12. On May 21, 1984, a "motion for a hearing and appointment of experts for determination of competency to be executed, and for a stay of execution during the pendency thereof" together with a supporting memorandum of law and an appendix containing documentation of Mr. Ford's present incompetency was filed in the state trial court on behalf of Mr. Ford. The motion set out in

detail the facts relating to Mr. Ford's mental status and was certified under oath to be made in good faith by the undersigned counsel. Because of his mental condition, the motion was presented by Mr. Ford's mother, Connie Ford, individually and as next friend to her son Alvin Bernard Ford. Connie Ford's affidavit setting forth next friend allegations was attached to the motion. Within four hours of filing the motion, memorandum, and appendix and although the trial judge was out of town, the judge denied the motion without findings:

This cause having come before the Court upon the defendant's Motion for Hearing and Appointment of Experts for Determination of Competency to Be Executed and for Stay of Execution During the Pendency thereof, it is hereby

ORDERED AND ADJUDGED that the defendant's motion is Denied.

DONE AND ORDERED in Chambers at Broward County, Florida this 21st day of May, 1984.

13. Review of the lower court's order was sought in the Supreme Court of Florida by the filing of a notice of appeal on May 22, 1984 and the filing of a brief or application for extraordinary relief on May 23, 1984. Oral argument was heard on May 25, 1984. On May —, 1984 the Supreme Court denied relief. *Ford v. State*, — So. 2d —, No. —, — (Fla. 1984).

14. In addition to the aforementioned action, Mr. Ford also filed an original petition for writ of habeas corpus in the Supreme Court of Florida on May 22, 1984. This petition was denied by the opinion of May —, 1984.

Next Friend Allegations

15. Movant, CONNIE FORD, is the mother of Alvin Bernard Ford, who is presently incarcerated on death row at Florida State Prison and is scheduled to be executed on May 31, 1984, at 7:00 a.m.

16. Mrs. Ford brings the present proceeding individually and acting as next friend on behalf of her son, because he is presently incompetent and is incapable of maintaining the proceedings himself, or of protecting his own right not to be subjected to the execution of his death sentence when he is incompetent.

17. Mrs. Ford alleges the following facts and incorporates the averments in her attached affidavit (Attachment A) in support of her status as next friend acting on behalf of Alvin Bernard Ford in this litigation:

A. Until sometime during the first six months of 1982, Alvin Bernard Ford suffered from no mental illness or disorder known to Mrs. Ford. However, sometime during this period in 1982, Alvin Ford began to develop a serious mental illness or disorder which, in the intervening time, has become so severe that he no longer is competent to protect his own legal interests, to understand why he is to be executed, or to assist himself in the face of his impending execution.

B. As demonstrated in Attachment A, during the period of time since the summer of 1982, Alvin Ford has grown increasingly distant from his mother and his family. At the same time, he has begun having delusions about the relationship between himself and his family and about what he is experiencing and is capable of carrying out while he is incarcerated on death row. In particular, Mr. Ford has come to believe that he has the power to communicate with persons outside prison through various devices such as radios and has the power to know what is happening in the world outside the prison by his own mental and perceptual powers. Because of his exercise of these powers, Mr. Ford has come to believe that his family and numerous other persons are being held hostage in Florida State Prison. As his illness has worsened, Mr. Ford has maintained these and other delusions but has also begun to feel he has the power to resolve the crises which face him. Accordingly, Mr. Ford has indicated that he has taken care of the corruption which caused the hos-

tage crisis and has, in the course of recent months, married ten women upon whom he is relying for financial support.

C. During the course of Mr. Ford's deterioration over the past two years, Mrs. Ford's contact with her son has led her to the conclusion that he is unable to understand and appreciate the reality of his incarceration on death row and his impending execution.

18. Accordingly, Mrs. Ford believes that her son is incapable of protecting his rights as those rights must now be exercised, and she thus asserts his rights upon his behalf as his next friend.

*Grounds Upon Which Habeas Corpus Relief
Should Be Granted*

Introduction

Since Mr. Ford has previously filed a petition for a writ of habeas corpus, the petition now before the Court is a "successive" or subsequent" petition. However, this fact alone does not permit the Court to decline to entertain the merits of the grounds presented. Only if the Court finds in addition (1) that a ground or the grounds raised herein were raised in the first petition and were at that time adjudicated on the merits, and the ends of justice would not be served by reconsideration of such grounds; or (2) that although a ground or the grounds raised herein were not raised in the first petition, the failure to raise the grounds in the first petition constituted abuse of the writ, *see Sanders v. United States*, 373 U.S. 1 (1963); *Potts v. Zant*, 638 F.2d 727 (5th Cir. 1981), can the Court decline to entertain the merits of the grounds presented.

Because the "abuse of the writ" doctrine has been so broadly applied in recent cases, *see, e.g., Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983); *Goode v. Wainwright*, — F.2d — (11th Cir. April 4, 1984) (No. 84-3224), it is crucial that the Court carefully analyze Mr. Ford's position that *none* of the three grounds he presents herein can be dismissed under that doctrine

or the related “prior adjudication on the merits” doctrine. For this reason, Mr. Ford has filed a separate memorandum along with the petition in which he fully demonstrates why these doctrines do not apply. As set forth in full in the separate memorandum, the doctrines do not apply to the first ground (§ 19, *infra*) because that ground was not previously raised; and further, because the facts in support of the ground were not in existence at the time the first petition was filed, the failure to raise the ground cannot be deemed an abuse of the writ. The doctrines do not apply to the second ground (§ 20, *infra*), because that ground was not previously raised, and because the law in support of the ground did not support the assertion of that ground at the time the first petition was filed. Finally, the doctrines do not apply to the third ground (§ 21 *infra*), because that ground as well was not previously raised; further, because the statistical evidence necessary to support the ground was not in existence at the time the first petition was filed, the failure to raise the ground cannot be deemed an abuse of the writ.

Accordingly, for these reasons—as fully documented and supported in the separate memorandum directed to the “abuse” issue—the Court cannot decline to entertain the merits upon “abuse of the writ” or related doctrines.

The Grounds for Relief

19. At the present time, Mr. Ford is mentally incompetent and his execution would thus violate the eighth amendment’s proscription against cruel and punishment and the fourteenth amendment’s guarantee of substantive and procedural due process of law.

A. Mr. Ford is presently severely psychotic. Counsel believes that Mr. Ford is so psychotic that he no longer has the capacity to understand his execution—i.e., the nature and effect of execution and why he is to be executed—or to communicate to counsel any fact heretofore not communicated which would make his execution unjust

or unlawful. While the facts material to the question of Mr. Ford's competency are set forth in detail *infra*, a summary of these facts at the outset is helpful in order to help the Court understand the process of Mr. Ford's deterioration which has led to the instant action.

(1) Mr. Ford's current illness has been the result of a process of deterioration for more than two years. Until late December 1981 or early January, 1982, Mr. Ford seemed to be in relatively good mental health. However, since that time Mr. Ford has gradually developed what has become by now grossly debilitating psychosis. Mr. Ford began having delusions in early 1982. Thereafter, as his delusions took hold, some auditory and olfactory hallucinations began accompanying the delusions. Gradually the delusions took over his entire conscious existence. The delusions centered on his belief that the Ku Klux Klan was holding his family and other people hostage in Florida State Prison in order to drive him to commit suicide. By the summer of 1983 Mr. Ford's delusions seemed to have changed somewhat. He seemed to have gained the power to free the hostages, to fire and prosecute the officers responsible, and to replace the justices of the Florida Supreme Court. At one point he referred to himself as Pope John Paul III. Thereafter, Mr. Ford's mental processes began to make "less sense" to those of us in communication with him. He began speaking in such a disjointed fashion that, while phrases could be understood, no sensible communication could be had. At some point during this time, Mr. Ford began to believe that he had won his case and that the state could no longer execute him. He seemed amused that the state might "try" to execute him anyway. By December of 1983, however, Mr. Ford seemed no longer able to communicate at all by the same words and syntax that inform conventional modes of communication. There has been no apparent improvement in his mental status since December, 1983.

(2) Through much of the time that Mr. Ford has been ill, he has periodically refused to meet with his lawyers. When the current death warrant was signed, we were in the midst of such a period. Mr. Ford had refused to see us since mid-December, 1983. While he still refuses to see us, we have obtained information, recounted *infra*, which confirms that Mr. Ford's mental health is today no better—and is probably worse—than it was when we were last with him on December 19, 1983.

B. The facts concerning Mr. Ford which must be taken into account in connection with the motion *sub judice* come from six sources: testimony in his trial; his written correspondence over the last two-and-one-half years; a series of psychiatric interviews and evaluations of Mr. Ford by Dr. Jamal Amin, from July, 1981 through August, 1982; a psychiatric interview and evaluation of Mr. Ford by Dr. Harold Kaufman on November 3, 1983; an interview with Mr. Ford by his attorney Laurin Wollan and paralegals Gail Rowland and Margaret Vandiver on December 15, 1983; the interview with Mr. Ford on December 19, 1983 by the commission of three psychiatrists appointed by the Governor pursuant to *Fla. Stat* § 922.07; and the facts reported about Mr. Ford's mental state at the present time. The facts presented by these sources are set forth in the pages that follow.

Mr. Ford's Correspondence

C. During Mr. Ford's period of incarceration on death row, he has been a prolific correspondent—with his attorneys, his family, his friends, his newly-developed (sometimes by correspondence only) acquaintances. His letters reveal a very bright, caring, principled person who is concerned not only about the events in his life—pertaining to his case and to the conditions and treatment of prisoners at Florida State Prison—but also about the events in the lives of the people with whom he corresponds and the major events that shape the lives

of people collectively. His letters also reveal, and dramatically document, his gradual decline into the serious mental illness from which he now suffers. Because Mr. Ford has spent so much of his time writing and has written so articulately, his letters thus provide an extraordinary window into his mental and emotional state and how it has changed over recent years. Accordingly, they are a unique source of material facts which show the gradual but unrelenting deterioration of Mr. Ford's mental health, and of equal importance, which show that Mr. Ford's illness is genuine, not merely a contrivance to avoid his fate.

D. Prior to December 5, 1981, Mr. Ford's letters revealed a seemingly healthy, "normal" human being. For example, on August 7, 1981, he wrote to Gail Rowland, a staff member of the Florida Clearinghouse on Criminal Justice (who served as a paralegal on his case and in the course of her work with Mr. Ford became a close and trusted friend), as follows:

Dear Rowland:

Content in knowing you and members of the Clearinghouse, had a safe trip to and back, from South Carolina. Relieved to know, we are still friends. Well I wasn't sure, after, all I've said, but it was only the truth.

Yea, I did receive your letter explaining you and members of the Clearinghouse, would be in a week of meetings, in South Carolina. You should have gotten, my last letter, showing I understood, you would be busy.

Content in knowing the meetings went well. I can understand your missing you, family, happy you're home. Also, and you were able, to be at the beach.

Will be looking forward, to seeing you. I'm still not sure, about some things, especially if I should write, about what happens, inside the Prison Walls. Think

I'm more lazy, than anything else, think a lot of times, how easy this would be, if I had a tape recorder. I still stress, the point. No one, should read anything I write, about the Prison. I'm still not sure, if I should, though. Hope to talk to you, if I feel better about this. I may have started, but I won't promise.

Well you need a car, if you don't have one. Do be sure to inform me, when you think you'll be back at Florida State Prison. I am not unreasonable, even if I seem, so.

Haven't received any word, on the Parole Commission Interview of 31 July 81, from relatives, but will inform you, as soon as I do. My sister had mentioned, talking with Wollan, by phone earlier, in July. I'm sure the interview had them, somewhat, not knowing what to think.

Thanks for sending the Amnesty Newsletter, back. I will most likely write Williamson, sometime soon.

Will truly be content, in seeing this summer end. Hope those days are over, wherein it was near or over 100°.

Know you'll be busy, at home as well as work. Hope you'll be able to visit your family in New York, in December.

You are a good friend, so stay in touch. Will think about writing about some of the things we discussed.

So take care.

Sincerely, Alvin B. Ford.

Appendix I (submitted herewith), Letters, A. Another, longer letter, dated August 31, 1981, to Gail Rowland was quite similar—sharing Mr. Ford's feelings about various events in his life, discussing the stresses and the boredom of life on death row, expressing his concern for

various friends and acquaintances, and mentioning his fondness for Dr. Jamal Amin, who was conducting an ongoing psychiatric evaluation for use in Mr. Ford's clemency and post-clemency proceedings. Appendix I, Letters, B. Again several months later, on December 1, 1981, three weeks after Mr. Ford's death warrant had been signed and less than one week before his scheduled execution, Mr. Ford wrote Gail Rowland a letter typical of all his correspondence to that point—expressing his gratitude for the hard work people were putting into his legal efforts, his special gratitude for Ms. Rowland and her daughter, and his happiness that Ms. Rowland had a good Thanksgiving holiday. Appendix I, Letters, C.

E. On December 5, 1981, however, health and normalcy began to give way. The first sign of Mr. Ford's break with reality appeared: he wrote in a letter to Ms. Rowland on this date that the staff of a radio station in Jacksonville, WJAX-FM (often referred to by Mr. Ford as "95X"), "have been talking to me, the pass few weeks," not by visiting in person or on the telephone, but in their broadcasts.

Dear Rowland:

Thought I would write about WJAX, and the staff at 95X-FM, who I had informed you, have been talking to me, the pass few weeks.

I wrote and informed them, their names will go in my file, so send Fins Esq, Hill Esq., a copy of this letter. Plus send Hill Esq. a copy of the letters, concerning death watch.

Well a friend Clyde Holmes, use to call 95X (WJAX) and ask Otis Gamble to play different songs for me. This went on for months.

I would tell Holmes, to give Otis Gamble a message (he calls himself, "the Greatest," the name I gave him, but usually Gambini) which would be, a message in a joking manner.

Then Gambini would get on the radio, and tell me, what he would do to me, by his being 6'4", and 230 pounds. So I would send a message I lift 400 pounds, easy. So this is how it started.

Then the guy who does the news, Scott, would get on and talk about 400 pounds. So for whatever, I had sent the message, they would let me know, they got the message. All this was in kidding.

I never wrote the radio station until a few days after the death warrant was signed. This guy Scott got on the radio, and was asking could I talk, "What's the matter with you, you can't talk," so I wrote.

From the time prison officials gave me the radio, Scott has been selling out, so much so. I couldn't let him get the last word in. So Scott and Gambini, has kept me laughing.

The guards know, they talk to me over the radio. Scott gets on the radio 5:30 A.M. in the mornings, and says, "is he up, wake him up," and the guard wakes me up, and I say, "Damn Scott is talking that crazy shit, this early in the morning."

The lady who does the news, Peggy, kids me because I kid her. Then while doing the weather, tell me no good news. She calls Bob Graham, the "gritch" (spell wrong) that stole X-mas. They tell me, all sorts of stories. Funny ones.

Then there's a lady name Destiny. Who takes over where they leave off, she said her name was Gail Adams, the other night.

The people at the radio station has really, made the situation more easier. They told me good luck, before the hearing Friday. Peggy, the newslady, said she hadn't heard anything about 5:00 P.M., asked had I one day I could hear them, turning the pages

of the newspaper, someone would ask, "any good news," the other, "I don't see anything."

They the four people have said, so much over the radio, to me. They told me it was (11) secretaries typing the weekend the after the hearing was denied in Fort Lauderdale, and so many other things I can't even begin to write.

So I thought I would like in the file, they were special people to me. They say, they will be with me, until 8 December 81. So I would like to have this in the file, if ever its read, by others.

Thank you, Alvin B. Ford.

Appendix I, Letters, D.

F. In a letter to Ms. Rowland nearly three months later, February 24, 1982, Mr. Ford again discussed his developing relationship with the staff of WJAX. In the intervening period since the December 5 letter, it is clear that Mr. Ford's delusional relationship with WJAX had become much more complex and more central to his ongoing life. Moreover, this letter introduced what was to become an overriding obsession: Mr. Ford's preoccupation with, and personal battle against the Ku Klux Klan.

Dear Rowland:

The leader of the Jacksonville NAACP was on the noon news, on Channel 4 (of Jacksonville) 23 February 82.

He asked that on one, show up at the Klan rally 25 February 82. The Klan will feel real strange.

On 21 February 82, I sent the radio station the article that was in the February 82 issue of Matchbox (Amnesty International). Also an article on this lady from Ireland, who won the Nobel Peace Prize, five years ago.

Candy Markman of Nashville, Tenn., mailed the articles, or article her father writes sometimes. He lives in St. Petersburg, Florida.

Mailed the article to Big "O" (Otis Gamble). That's what I call him. I saw him on television once. He runs the opinion line. So guess I'll start back writing.

I don't think Jacksonville, is ready to know, I've been writing most of the topics for the opinion line.

All except for three programs, this month. The reason, missed two this week, because I told the staff, at the radio station, I wouldn't be around this week, to hear the people call, and talk of hate, for the Klan, and people because of the races.

Destiny was crying Monday night. Guess Big "O" showed her the picture by Doug Magee, of the Gas Chamber.

I have a plan, in this opinion line, if the station keeps using the ideas which leads to votes, and gun control. But it will take months of the opinion line. . . .

Will be in touch.

Sincerely, Alvin B. Ford.

Appendix I, Letters, E.

G. By February 28, 1982, just four days later, Mr. Ford's delusional system had taken a quantum leap. On February 25, 1982, two events occurred in Jacksonville which took on extraordinary significance for Mr. Ford: the Ku Klux Klan held a rally; and fire destroyed the house and lives of a black family, killing the father and six children and leaving only the mother alive, because she was pushed out a window by her husband to run for help. In a very long letter to "Destiny," one of the staff

members of WJAX, Mr. Ford explained the significance and interrelationship between these two events—i.e., the Klan started the fire—and explained how God had revealed these facts to him. Because this delusion is of central importance to the subsequent development of Mr. Ford's delusional system, and because the way in which Mr. Ford reports having discovered that the Klan started the fire is so revealing of his increasingly psychotic state—in which delusions, loosening of associations and hallucinations are manifest¹—the letter is reproduced here in substantial part.

Destiny:

Please read my letter of 24 February 82, again. Then make copies, of both, that letter, and this one.

Then I want Ed Austin, to read the letter of 24 February 82. Also this letter. Make him a copy of both. I'll need him at the end of this letter. I always call him, Ed.

The letter of 24 February 82, was a thought, question, answer, letter in a sense. I will just go over it.

¹ See American Psychiatric Association, *Diagnostic and Statistical Manual* (Third Edition, 1980), at 182-183 [excerpted in relevant part in Appendix I submitted herewith] [hereafter referred to as "*DSM-III*"]. See also the definitions of these terms:

"*Delusions*" are "false personal belief[s] based upon incorrect inferences about external reality [which are] firmly sustained in spite of what almost everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." *DSM-III*, at 356.

"*Loosening of associations*" is a form of "[t]hinking characterized by speech in which ideas shift from one subject to another that is completely unrelated or only obliquely related without the speaker's showing any awareness that the topics are unconnected." *DSM-III*, at 362.

"*Hallucinations*" are "sensory perception[s] without external stimulation of the relevant sensory organ." *DSM-III*, at 359.

Now that you have read that letter of 24 February 82.

I didn't get the 25 February 82, newspaper, Florida Times Union. So guess something was in there. Then have the feeling, more people are waiting for this letter, than in the pass.

Even heard Reagan over 95X talking about the light by the plant. That light, is something I can only see it, when he is ready. I'm waiting on it now. Have saw many things, and didn't start understanding until the newscast 4:20 P.M. by Peggy 95X FM, on 25 February 82.

There's times when I write about things, as to when, or what date, they will happen. If I can't see the light from the sun, I'm lost. Then it's not the sun, someone much Stronger. Those who read this letter will see the light I'm talking about, and know, this is the light, I see by, when he wants me to, I have no control, it's only when he wants me to see.

....

I never forget, what has happened this pass week, to ten days.

I was very content in hearing, the leader of the Jacksonville, NAACP (on Channel 4) ask that no form of protest be given to the Klan Rally 25 February 82. (This was aired 23 February 82, on Channel 4 noon).

I wondered how the Klan members would feel, with no one, there to hate. Also was content, some television stations, showed little coverage of the Klan members, up until 25 February 82.

Was more concerned, as to, how the young students and children, would react, to such hate. I learned about love, and people, in my own way, and had the

best teacher. Everyone, will see that teacher, who reads, this letter.

The light, that shines, through the window, to the floor, you'll see it, it's in the light. It's no one, but God. That's how, I see things, in the outside world. It may seem strange, but he, is much powerful, than any of us have ever, conceived, or rather much more powerful, than any man, ever conceived.

He showed me, the past seven days, and I will tell you how. It really frightens me, once I begin to remember.

This all started, when Destiny asked, if I knew her age, 95X, the night of 24 February 82. Then asked how, I knew, there was a living plant, in the room, (at her apartment) with the Bird.

I informed her, the light was shining, on the floor, she must have turned, and saw the light while on the phone, when she called the radio station, 95X, that morning. Guess she didn't know, he was there, in the light. Don't know, the reason, for her calling, but that's why he was there (God). That's how, I saw the plant. She is a special Friend. As all the members of the staff at 95X.

In the 24 February 82, letter, I tried, to explain, to Destiny about the light, without mentioning God, was the light, because he knows, I know. Already.

In my trying to explain, I mentioned a few things. As how sometimes, I can see things, days, sometimes weeks ahead, of time. There's times, when I'm wrong. That's God's, not with me, or rather I'm not with God, because he, is always there.

....

4:20 P.M. 25 February 82, Peggy's first news story was of the Klan rally. But she sound, so frightened,

I'll never forget the cold chill, I got as if she was talking to Death, itself, her voice never has ever sound, so frightening, and chilling.

During the second story on the fire (the man and six children) I saw three black images, standing behind her, in or black images as the outline of someone, in the Klan hood and gown. The chill was so cold, that it frightened me.

After the newscast, I thought of the letter of 24 February 82 and somehow, just hoped, Peggy wasn't afraid of me. I didn't understand what had happened, until later that evening about 6:00 P.M. matter of fact, I didn't understand what had happened, until about 6:00 P.M. 25 February 82 (Friday), and still didn't know, everything, until I saw the sunlight, the morning of 27 February 82, with Sandy.

He showed me everything, and left something, so you'll know how great he is. He only let me look in the window once, I wanted to look again, but he said it's there. Soon you'll see what I saw, and know.

I know the Klan members, burned that house.

....

Rather than tell someone, what I was thinking, I wrote 95X, and asked Peggy to let me know, if she, hear the news, on the cause of the fire. The morning of 25 February 82.

Watched the 6:00 P.M. news on Channel 4, then saw the faces of the Klan members, who, burned the house (on pages eleven and twelve). [Mr. Ford is here referring to * * * two newspaper articles, * * *.]

They were Bill Wilkson, the leader, Robert McMullen, and the Klan member, with the reddish brown beard (holding the two signs) with the wood part

in his hand. That's in the 6:00 P.M. Channel 4, newscast, 28 February 82.

I was wondering, who I could inform. But I see now, someone's waiting on this letter.

Peggy made some type of noise, in her throat, while mentioning, the gun law, had pass, as stated in the 28 February 82, paper, and letter of 24 February 82. This made me take a closer look at everything. As far as what I had written, in the letter of 24 February 82, and what had happen.

* * * *

....

I sat down and looked at that picture on page twelve [the picture reported in the *Florida Times Union* edition of February 26, 1982, *supra*], and went over it many times. I saw the man, Robert McMullen, pouring something on the roof of the house on page twelve. The man with the reddish beard, through fire, in the first window on the corner of the house, where the meter is, it's marked (X).

There was a man inside the house, this is why "the little girl, said the house frightened her."

The man pushed the lady out the window, nearest to the meter, so she get help, and she called God. As I did, after seeing, all this. I asked God to help me, with the light, I had saw, by the plant because, the investigators couldn't find the evidence.

Then the sunlight, arrived, in the window, by the meter, I saw something in the ashes, I still don't know the name of it, because seemed, as one corner, was in the ashes, I wanted, to move it, but couldn't touch, it, to get a better look, it looked like this:

[Drawings Omitted in Printing]

The brown picture, is the first one I put on paper, so I wouldn't forget what I saw. This was the only thing, I saw with the light through the window.

I didn't know, what either of the pictures, on page fifteen [the diagrams, *supra*] was, because it looked silver, around the edges, and black engrave, with one edge in the ashes, covered, looked as though.

I looked and looked, this is the only thing that looks close to it. (on page seventeen) [Mr. Ford is referring here to page seventeen of his letter, which contains the picture of the Klan member, *infra*.] Turn the drawing on page fifteen [diagrams, *supra*], see how it fits, there's only one thing missing, the last corner (as in the house on page twelve).

The lady in the newscast, 6:00 P.M., on Channel 4, is the other corner.

The evidence, is in the path, of the light, on the floor mark the path of the light, from the window on the floor.

I only saw in the window once, and would like to see, what the window, showed.

He said, the lady, in the blond or with the blond hair, who was in the Klan outfit, go get her (only) for now.

. . . .

Then let her read the letters, of 24 February 82,
....

Then take her to the house, to see what God left, as his mark. Then give her the money, and make sure, she is safe, and free to go, wherever she wish to go.

She will see the light, also, and she will continue to, until she does the right thing. That will be the only way she can stop his power.

I don't know you, but saw you at the Klan Rally, pretty blonde hair. God, will be talking to you, so don't be afraid. Be still listen, and think, that's how he talks, when you see the light, look at it, spinning, on the floor.

Look at your feet, when you get inside, he will make you remember, standing right at the fourth end of the picture you saw, I saw the light through the same window.

The lady, pushed through the window, called God, as the house was burning, and he answered. I don't know what you'll see inside that house, when you get there.

But don't be afraid, you will see what I saw, through the window, but you'll see the light God only allowed me to look in the window on page twelve once.

Ed Austin, you may know me, I met you in the Fourth Judicial Circuit, Nassau County, Fernandina Beach, in 1980.

You remember, in the case of the young white kid, who killed the convenient store worker. Judge Adams, I know you fear God, this five days pass, I learned, how great he is.

He said, give you a copy of this letter, and get one of the 24 February 82. Then know, he is God, writing this, for me.

He said, go get the lady, in the Klan outfit, and bring her back alone. Her picture is in the Channel 4 newscast 6:00 P.M., 25 February 82. Blonde hair.

Let her read the letters, then take her to the house, and let her, see his mark.

To tell you the truth, I wanted to see it again, but I'm frightened of the glow.

I don't know, what you'll see, but God help you. He also said, to mark the area, whatever it is he wants you to see, also. So be there early, and wait on him, he will come in the window, by the meter, slowly in the light.

Whatever is there, no matter what, they are to look, and mark the light. I saw something, in the ashes, in the light, looks like on page fifteen (the drawing).

He said, to tell you to look at the light, as it comes through the window, then come back, when the lines are marked, from the light on the floor, from the windows.

Then know, she went for his help. Also, no matter, what's there, go get the girl (blond hair, Klan gown) and let her read these letters. Then take her to the house. He will do the rest.

He said, give her the money, and make sure, she is safe, and give her, a little time, to think, after she, see whatever, he left there in the house. Also make sure she is free to go.

God bless the staff at 95X, and those who saw this, work of God.

Sherlock.

["Sherlock" is Mr. Ford's nickname in the prison.]

Appendix I, Letters, F.

H. During the month that followed the writing of this letter, Mr. Ford seemed to return to a relatively healthier state. His loosening of associations and hallucinations, so clearly evident in the February 28 letter, seemed to have subsided. As evidenced in his letters to Gail Rowland of March 8, 9, and 13, 1982 (Appendix I, Letters, G, H, and I), Mr. Ford continued to believe his delusion about the Ku Klux Klan—*e.g.*, "[t]he letters

concerning the Klan has bothered me some what, because I want the Grand-Wizard" (Appendix I, Letter, G)—and his delusion about his ability to interact with the WJAX staff, but he also seemed to be communicating in the "normal" style and about the "normal" subjects he formerly wrote about.

I. Mr. Ford continued to communicate in this fashion until April 17, 1982, when a letter to Ms. Rowland on that date showed some further advance in his delusional systems, accompanied by the injection of paranoia into his delusions as well as the re-emergence of his loosening of associations. In the first half of this letter, Mr. Ford wrote matter of factly and "normally" about Ms. Rowland's family and associates, the decision by the panel of the United States Court of Appeals in his case, and an upcoming meeting with one of his attorneys. Then abruptly, he wrote:

....

I saw Graham on television, with water in his eyes, talking about that letter I sent the lady D-Miami, with the words, unlined. Wait until you read the letters, Destiny has at WJAX.

....

The people at the radio station, Destiny, has information, on some things that happen, the following day, after I had written her. I haven't been writing for their opinion line, because trying to keep up, with the Ku Klux Klan, has gotten me tired.

Thank you for nice Easter card. I have stop writing about anything, as to when or where, it will happen, because this whole thing, leaves me very tired, and the people at the radio station, keep asking for more, when I haven't rest.

Haven't wrote Candy Markman's father, yet because the talk about war, scares me. So I just stop, writ-

ing anyone, who may seem to ask some strange or unusual question.

I have to see what Destiny has done, with all the letters. Doug Magee [a writer from New York who has published books about death row] is at that radio station saying his name is Dale Taylor. I haven't received a letter, from him, so I'm about ready to stop writing that station.

Well hope to see you soon. Think I'll just rest some. Tell Geoff and Tao [Ms. Rowland's husband and child] hello for me. I don't know much about the book, but whatever, I write, I don't plan on sending to WJAX, until I find out, what happened to the other things I have written so far.

So take care, and hope to see you soon.

Sincerely, Alvin B. Ford.

Appendix I, Letters, J.

J. Over the next three months, Mr. Ford again seemed to have "gotten better," as evidenced in his letters. Appendix I, Letters, K and L. To be sure, his delusion about the Ku Klux Klan remained intact, and he reported devoting much effort to seeing that Bill Wilkinson (the leader of the Klan) would eventually be prosecuted and convicted for the arson-murders in Jacksonville. He also took care to be sure that Ms. Rowland and her colleague, Scharlette Holdman, knew about what he was doing and understood the "evidence" he had against the Klan. And his concern for his "Klan work" was so pervasive that he reported little concern about anything else, even the legal proceedings related to his conviction and sentence:

I have the briefs from the lawyers, Burr III and Fins Esq. I've been so busy I haven't had the chance to read them, but will this weekend. I don't worry too much about the ruling that will be from the 11th

Circuit, on the rehearing. Have many other things to keep me busy.

Appendix I, Letters, L. However, he also was able to communicate about everyday matters concerned with his and Gail Rowland's friendship, Appendix I, Letters, K, and his manner of writing was more coherent, reflecting another remission of his loosening of associations.

K. By July 8, 1982, Mr. Ford's remission ended. On that date, he wrote Scharlette Holdman (Florida Clearinghouse on Criminal Justice) a letter reporting a significant advance in his delusional system: he had just discovered that Gail Rowland *was* "Destiny," and he wanted to know why she had been trying to fool him for the many months she had been seeing him.

Dear Holdman:

As soon as, you have time, do reply to this letter. I've been writing WJAX some time now, to an A/K/A Destiny.

Most recently I found out she is Gail Rowland. This is because she mentioned, something, I told her, in prison, at the prison, during a visit.

A while back this Martin, was sending me messages, threatening to kill her. So I asked Angela [news-person from Channel 4, Jacksonville] to ask Ed Austin to put a wire tap on her phone, and watch her home. This fraud case came, up. The police, was looking for Martin. I wrote Angela and told her he was more than likely at Destiny's. This where, police, picked him up, the following morning.

Gail Rowland, has, been writing from this address. Granda Apartments, 2131 North Meridian Road, Apartment #111, Tallahassee, Florida 32303.

19 June 82 there was a wedding. I put Gail Rowland's name on the letter, sent it to Channel 4.

The reason I think she (Destiny) is in fact Gail Rowland, is she mentioned some things, I have told her in prison. Now to the serious part. Destiny has been playing games, with me, for three months. Most recently, threats.

I've been so angry, I had the thought in mind of hurting another prisoner. Seriously, I couldn't believe this was Gail Rowland.

Haven't had a reply, from her, in quite a while. I have a 50-page letter on her. Threats, etc. . . . she can cause me, to get another murder charge.

She always mention, she has been help you. So tell me what you know about her. I don't want to hurt her, in any way, or the efforts in the fight against the death penalty.

She has caused me, a lot of confusion. There was, well, I'll wait on reply. Do be in touch as soon as possible.

Sincerely, Alvin B. Ford.

Appendix I, Letters, M.

L. That Mr. Ford's July 8 letter was a sign that his illness was worsening was powerfully confirmed some two months later, in a letter to Deborah Fins, an attorney who formerly represented him. By the date of this letter to Ms. Fins, September 11, 1982, Mr. Ford's delusional system had become all-pervasive and all-encompassing. Because of his work against the Klan, he believed that he had become the target of a complex scheme of torture ultimately designed to force him to commit suicide. Although this delusion has undergone some change from September, 1982 to the present, this is the central delusion which has governed Mr. Ford's daily existence since its onset in September, 1982. There have been no remissions—from the grip of the delusion, the loosening

of associations, and the hallucinations—since then. Because this delusion has been so dominating, Mr. Ford's entire September 11 letter has been reproduced, for it is the critical stepping stone from the past to the present in Mr. Ford's life.

Dear Fins. Esq.:

Thank you for your letter of 22 July 82, as of this date, I still want my, files closed to Doug Magee, and no one is to have access other than lawyers.

Also I do not in any way, want Dr. Amin, or Gail Rowland, associated with my case in any manner, as of this date.

I'm sorry I haven't replied to your letter, until this date. I have had a number of problems, at Florida State Prison, over the pass three months, with guards, the KKK, and Owl Society or organization.

I really wanted to see you, it's been such a long time, Deborah. I wasn't able to leave the cell, hopefully you got the refusal slips, and the messages, I wrote on them, to you.

If you receive any affidavits concerning what has been going on inside the prison, do hold them, and make sure all persons, attorneys, etc . . . receive copies. Do excuse, my saying you were missing, this was the only way I could get the prisoners interested enough to write, wherein I could get some help.

Dennis Balske of the Southern Poverty Law Center, should be sending copies of letters written prison officials, and lawyers, concerning the problems, I've had here over the pass months, mailed them, to the Poverty Law Center, because of their Klan-Watch. Then asked that they send letters, to or copies, to the lawyers.

My situation needs a solution, as soon as, humanly possible. I have been threatened 24 hours a day, for

the pass three months, by guards and Bill Wilkinson of the KKK. He has been working here, under the name of Officer McKenzie, Q-Wing.

When you do visit again bring a tape which can play six to eight hours. There's so much has happened, until I don't know where to start.

My life is in danger, by these guards and the KKK, and Owl Society, or organization, plus this labor union, you should be receiving, copies of letters, to this effect.

Other than threats, I have been, okay. Have been more less, trying to gather information, and review the situation.

Please call Wollan, and Dennis Balske of the Poverty Law Center, to get a full report. Wollan, Burr III, and Craig Barnard with Vandiver, was at Florida State Prison on 11 September 82.

I've been hounded by Bill Wilkinson and the KKK, 24 hours a day, the guards, in the labor union, and Owl Society.

They put me on DC for quite some time, for no reason. Just got some stamps and Wollan, brought some. Just got some pens and paper to write with.

Things have been the same continuous hounding. They are at my door now and in the pipe alley at the cell, vent.

The story is too long to write, but it's the truth. A lady is being held in the pipe alley on Q-Wing, third floor, behind the cell, I'm in.

I'm told the man holding her name is Crooks, the only Crooks I know of is one who works at WJAX 95X, 4:00 P.M. to 6:00 P.M. Sundays.

While waiting to see, the lawyers 10 September 82, the Counselor, Harrington, said I'll be moved to

R-Wing, the working week of 9/13-17/82. While in the Cage, by the Control Room.

As soon as I got back to Q-Wing, I was told Crooks, is to murder me on R-Wing or S-Wing, and either make it look as a suicide, or murder. This lady has been held in the pipe alley since, well about two months, being raped by guards as well as prisoners. This is the reason, I haven't gotten very much help. Guards are allowing prisoners to rape this lady, to keep things quiet, and no one knows she is in this prison.

I hear her now, asking this man, "Please don't kill me." I have been on Q-Wing since 2 August 82, and hounded every day for 24 hours, by the KKK and guards. Can't even eat, without them at the doorway and cell vent saying they put, "Semen in the food, by having this lady, perform oral sex," this is every day, for the pass three months.

While on S-Wing, guards have tried to ease my door open in the A.M. hours. Luckily, I was not asleep, 3:30 A.M., because this plantigraph was waiting to enter the cell with a knife and hatchet, this is the truth, whole truth, and nothing but the truth, so help me God.

Doug Magee, published a book, and changed the authors sold for \$680,000. I wrote that book. Paul Robeson, All American, author Dorothy Butler Giliham. He nor Destiny said a word about it, but I found out, the plan was to try to run me insane, and make me commit suicide.

This why I don't want Dr. Amin, on my case, and Gail Rowland. No one can get the money from the book unleses, I'm dead. As soon as possible I'll write the whole thing. I had but being threatened by the KKK, in prison, I had to pass the evidence.

I've never told you a lie, and this is the truth. Deborah, I think these guards, have been killing people, and putting the bodies, in these concrete enclosures, used for beds, on Q-Wing. Deborah, this is the truth.

These concrete enclosures are used for beds, about six feet long, four feet wide, and three feet high, just a concrete block. The one inside the cell, I'm housed in was open from the pipe alley I think, and the smell was awful, decomposed bodies.

Do know I've never lied to you. While I was out to see Wollan, Burr III, Craig Barnard, and Vandiver, I was afraid they may try to clean these things out. I don't know what happened, but the lady is still in the pipe alley, and at this very moment someone outside my cell door, with threats, the voice sounds as Bill Wilkinson of the KKK.

Before I moved to Q-Wing to DC, 2 August 82, I was on DC on S-Wing-1-North-17. There was a gun on the floor, that was pointed at me, told guards. No one, did a thing, was a shake down 17 July 82, led by Bill Wilkinson.

Got a UCI-666 (Form) (sent to Dennis Balske of the Southern Poverty Law Center, asked he send all the lawyers copies, notarized) which was written by Bill Wilkinson, which said, one altered ink pen, and 5 bundles of paper.

That five bundles of paper was evidence on the book, mentioned on page five [of this letter], and on the KKK, and the hounding by this Destiny at-WJAK 95X Radio Station. The five bundles of paper was going to Jim Smith, State Attorney General. They were trying to get me, to throw them, away, because guards names were mentioned. I wouldn't throw these papers away, so they gave me a DR, for having

a knife, when do you know of me having a weapon, since being in prison. 17 July 82.

15 July 82, the lady who does ABC radio news, told me not to give those same bundles of paper (letters) to Classification Officer Dan. I gave them to him, after some thought asked for them back. As soon as I did, you need a haircut, another DR (the letters were four brown envelopes to Jim Smith on the KKK, the book, and guards, and hounding by this Destiny).

This lady in the pipe alley said, Sergeant Combs, had a gun to her head telling her, she better never tell, she was beaten and raped, with Officer Adams. In the stairwell of S-Wing I heard them, and told her, she can tell anyone, because they had no business, with her in the pipe alley.

When I said that, they cut off my water to the sink and commode. Orders of Bill Wilkinson, on S-Wing. Then I was given a DR, saying I threatened to kill a guard, by Officer Adams.

So Deborah, I've been on DC, quite a while. They have been trying to kill me. Their plan was to do so on Q-Wing, took everything I owned 2 August 82. Had no stamps, pens, paper or envelopes, until September, although I borrowed a pen and paper. Had no stamps, but found some reusable ones on old envelopes and mailed a letter out.

Didn't get a slip concerning my property until 8 September 82. Had over \$25.00 stamps, 400 envelopes, 500-600 sheets of paper, 30 pens. Not sure where my personal property is, but guess I'll find out when they take me off DC. More than likely will have to file suit, under High Risk Management.

These people who have been threaten me, told me, they murdered all my family. Hopefully you can, get

back down here, and bring a full tape, that will play six to eight hours, each day. No haven't heard a word from my relatives.

Channel 4 of Jacksonville has been helping. Keeping the guards from killing me. The evidence, I wrote to Jim Smith, State Attorney General, concerning that book was written over the cell walls of Q-3-West-3, the cell I'm in now. (That evidence on the book, was removed from my cell, from S-Wing in the month of July 82.)

Bill Wilkinson says he has my address book, and is killing everyone in there, by address. So I wouldn't have anyone to help me. Guards wouldn't mail my letters, only beat this lady whenever I tried to write the outside, for help.

So I've had to fight the KKK, guards, and prisoners. Also, because the KKK, and guards, has been using the prisoners against me, as well allowing to rape this lady, being held hostage.

So my life is in danger, and need help. Please send a copy of this letter to the FBI, as soon as possible, and contact, other lawyers.

Please be in touch as soon as possible.

Sincerely, Alvin B. Ford.

cc: CIA-FBI
Directors
Washington, DC.

Appendix I, Letters, N.

M. In Mr. Ford's letters which followed this letter in September, 1982, the same information was presented. But in a letter dated September 12, 1982, to Ed Austin, President Reagan, the United States Attorney General, and the directors of the FBI and CIA, three new aspects

to the delusion emerged. First, Mr. Ford noted that he had been in direct communication with President Reagan about the Klan's crimes in Jacksonville from the very beginning:

The President of the United States of America, should remember well, this case. He was at Camp David, the night, I was writing those letters, concerning the KKK, and mentioned, the "Light by the Plant." He said in the early A.M. hours, this was a "grace period," over the air, live broadcast. I have Mr. Reagan as my witness, and these members of the CIA, along with the radio tape, of 27 February 82 (A.M. hours) over the world news, in the last four minutes on the hour on the above date.

Appendix I, Letters, O. Second, Mr. Ford indicated that messages had been passed between him and various media representatives "through this book, I've been writing from, the Second College Edition, Webster's New World Dictionary of the American Language, William Collins Publishers, Inc., 2080 West 117th Street, Cleveland, Ohio 44111, Copyright 1979 by William Collins Publishers, Inc." *Id.* Third, Mr. Ford reported that the women who were being tortured and sexually abused in the prison might be his mother, Connie Ford, and Angela Estelle, of Channel 4 in Jacksonville. In another massive letter written in September, on September 26, Mr. Ford implored Deborah Fins and the Attorney General of the United States to undertake legal proceedings to expose what was going on at the prison and to require his transfer to another state prison. For nearly twenty pages in that letter Mr. Ford listed the investigative steps which needed to be undertaken in connection with those proceedings. *See* Appendix I, Letters, P.

N. Just one month thereafter, on October 22, 1982, Mr. Ford began to report yet another new development in his delusion—one that, over the course of the next year and beyond would become the most significant element in

his world of delusions: the taking of hostages by the persons who were already tormenting him at Florida State Prison. In a letter to counsel, Mr. Ford reported,

The same thing has been going on daily, since I saw you. I found out more, this Gail Rowland, along with Dr. Amin, is holding my sister, Gwendolyn Louise Ford Shaw Williams, and Connie Ford (mother) hostage in this prison.

Appendix I, Letters, Q.

O. Less than two months later, on December 5, 1982, Mr. Ford's belief that members of his family were being held hostage in the prison had solidified. Moreover, during this time, he had come to believe that an increasing number of hostages—to this point all family members—were being held. When he would receive mail from these relatives, he would not at all be shaken from his belief that the relatives were nonetheless being held hostage. Indeed, because of the loosening of associations in connection with his psychosis, the logic governing his world had little to do with the logic governing the rest of the world. On December 5, he wrote,

Dear Grandmother,

I received your letter and card. I haven't written because of a number of reasons. I hope you will be well, feeling okay when this letter, reaches your hand. I have been okay. But I want to tell you don't, ever be afraid, of my dying, because this will happen one day.

You mentioned your being 73 years old, well don't let anyone threaten you into doing anything, at all. If anyone can, hurt a 73-year woman, they have to be really sick, so try to understand, and just believe in God, and ask him to forgive those, that do you wrong.

I know you are inside, this prison, behind my cell. I have been wondering, how you got in this prison, also with mother, Gwen, and the other relatives.

I have been more surprised, in your not telling me, from the first day you were, brought in this prison.

God, put your trust in God, don't write, and tell me lies. This is the reason, I had such a time, finding out about all the family, from this prison cell. So don't do anything, against your will, you are not to be held hostage, in this prison, by these people. God, is the answer, so take care of yourself as well as humanly possible.

Hopefully your knee is better. Also you were able to have the X-ray. Tell Uncle Henry hello, also he must be held hostage here, also. Tell him, he should write.

I won't be having any visits, until all my relatives, are safely out of this prison, one way or the other. I know now, about the relatives, as well as the outside world, so trust in God.

I've given these people, every chance, possible, to let you, and the relatives to go, but looks as though, they refuse. So if they hurt anyone, the crimes, will surely, have a lasting effect.

Thank you for the stamps and God bless you, and keep you safe. Trust in no one, but God.

Sincerely, Alvin B. Ford A/K/A Sherlock.

Appendix I, Letters, R.

P. As time wore on in 1983, Mr. Ford's delusional system remained very much the same. Gradually, however, more people became hostages, and as more people became hostages, Mr. Ford's role as the only one who

could help the hostages, began to develop. As this role grew, Mr. Ford became increasingly angry—righteously angry—and increasingly grandiose. On March 28, 1983, for example, Gail Rowland received the following angry barrage:

Dear Rowland:

I received your 16 March 83, 21 March 83, letter. Sorry in my delay, in this reply. Since you have been in the pipe alley, behind my cell, with my lawyers, family, and prison officials, since July 82, even death row inmates, I decided, I would not write, until now.

Also I note all the people, who was working at 95X, WJAX, are also inside the pipe alley, behind my cell.

You know the story too well. I know very well, you have told quite a few lies on my family and me, since the first day you had my relatives, brought to the prison, back in July 82. Whatever reason, you brought them here for, possibly, you will explain it, later, in a letter or in person.

As far as your leaving this prison, going to Tallahassee, to write for that newspaper, I won't comment on that point, as of yet.

You know, all too well, my problems, and the problems, of those people you have told lies on. Also you know or have known, full well, the attitudes of prison officials, since your first visit here in 1981 when that death warrant was signed.

Also I want an explanation, as to why you have my relatives, lawyers, etc . . . here. Then the reason, all these death row prisoners, are out their cells, bothering my family and lawyers.

Then about the book, I was writing, why didn't you, tell me, your name, was the Destiny of 95X, WJAX.

Also why was the book given a different title and author, and why didn't you send me, a copy of my own book. Then why was it put in a will.

Then the reason all the people are here from 95X, WJAX, also Doug Magee, who I sent, to New York, to come to Florida, to write the book. Dale, of 95X, also, why wouldn't he, tell me his name.

The book is written, now 18 August 82. Destiny is dead. Why was this in the newspaper. Who should I write at WJAX 95X about all my material, since Destiny is dead. Also since Dale, Doug Magee, who never told me, his name.

Guess all that's lost, and Destiny is dead. The book sold for \$680,000, and was put in a will to Gilbert. I know the whole story.

I told you long ago, I would give you that book. Where is it, you had it, all the letters. What are you, pulling on me, and my family.

First I want you to know, I am a man, possibly, the best you ever knew. You will not treat me as some dumb-ass nigger.

You had no friends, you don't even know, where my book is. Never gave me one penny, since I've known you. Not sent one package, or anything.

Then you treat my family like they are no one, in front of people, who could give less than, a damn about you. When there is no money, no drugs, see where they go.

I will write any lady, I want, this jack-off shit, you can take to someone else. This talk about Leper, etc. . . . want you to understand. I can call any

woman, and I demand respect. If you want someone, else, go ahead.

Greatest man on this earth or what. There's quite a few things I have to say. First I've joined the Ku Klux Klan, to get my family out of this prison. Because looks as you won't stop your lies.

The whole while, since July 82, I've been trying to get my family out of here, you have been trying to keep them here, why. Then my lawyers.

The crime watch on Channel 4, what happened to all those letters. Was there ever any money, from the letter. No, I don't guess, you never told me, if I was ever right on the crime watch.

Since July 82, I've sent teletypes, as you know. The talk has been on my case on appeal. Now that I've dismiss, my case, there's nothing to talk about.

My family know, nothing of the Ku Klux Klan, why do you have them talking this foolishness, scaring them, with these guards. Whatever lies, you told get them straighten out.

Now all these punks, on death row, you have out these cells. I'm trying my best not to hurt anyone, all of them are punks.

This asking the guard for a cigarette, shit. Trying to keep me, from purchasing things from the store is some shit. Who is guard Ortagus is he Scott of 95X, is Willis, "CC", and what's "Steve Fox." I hear all their voices, but neither has come, out and gave me their name.

You know, I've been on DC, since July 82, and all these DR's these guards have written, even those on the Disciplinary Committee.

You know, very well your lies have hurt, my family. I don't know, how many have been told, by others, but it's pass time, you stopped lying.

So I joined the Ku Klux Klan. Now what there's no money. I need some. Have you been telling people, I have money.

The lawyer will be years, getting the book back. Well what now, since I joined the Ku Klux Klan.

I read some on Bill Wilkinson, he no damn fool. From what I've read he knows of business, and is not no small-minded person. Even though these people, who are bothering my family treat both him and me like, damn fools. And I'm tired of it.

This shit, streak all night, is a bunch of shit, these guards don't know a damn thing, and keep bothering my family. I'm tired of it.

Scott, knows the messages, and I damn sure will not let, any these punks, snitches, know what he has told me. Because now, is the time to move.

These guards and inmates, don't know a damn thing, and I'm tired of this shit from these bastards, bothering my family.

This is not for them to know, and they won't know. These motherfuckers are going, to get from behind my damn cell, and my family is going home.

I'm tired of these petty-minded bastards, these inmates, it's more than enough to try to save their lives.

I have too much work to do, than this bullshit, you're throwing at me. I expect anything I want or need.

Also to talk to each person from 95X, later. I have many people, I need to contact, you know all, my problems, so won't discuss them.

Will have you contact some, missing property, DC, lawyers, family, visits, schedule, them all, packages, stamps, etc. . . .

Be sure to write.

Sincerely, Alvin B. Ford.

Appendix I, Letters, S. And only five days later, on April 2, 1983, Scharlette Holdman received a letter, in which Mr. Ford recounted the growing magnitude of what he, by then, was referring to as "the hostage crisis," and the critical, world-historical importance of his role in trying to resolve the crisis:

Dear Holdman:

I've heard your voice in the prison in Q-Wing, since August 82, when I was housed on Q-3-W-3, and Holly Morris, even Margaret Vandiver, Professor Wollan, Gail Rowland, Deborah Gianoulis, Tom Wills, Julian Bond, Rev. Jessie Jackson, Senator Edward Kennedy, all my family members, Dr. Amin, Susan Cary, Esq., Richard Burr, III, John Middleton, Esq., William Sheppard, Dr. Gwendolyn Tucker, PBS Channel 7, Honorable Arnette Girardeau, Honorable Haben, just to name a few of the names.

I've written many people, from the Superintendent of Florida State Prison, to the former Superintendents, prison inspectors, Wainwright, the Attorney General, Joy Shearer, the Assistant Attorney General, United States Attorney General, FBI Director, even President of the United States, Southern Poverty Law Center, and many others.

All concerning my family being held, hostage inside the prison walls, at Florida State Prison, by the Ku Klux Klan.

You know, all too well about this, and these mind readers. I was very disappointed you didn't or

couldn't do anything in December, other than join the Ku Klux Klan, along with others, who were held hostage. It's been about 263 days, my family has been here. I understand you, Rowland, Fins, Esq., Carey, Hill, Esq., are ladies, Morris, Tucker, M.D., Gianoulis, Jefferson, Silberstein, are women, which makes, this much tougher, along with others.

I went ahead and joined the Ku Klux Klan, to save the lives of my family. This man holding them hostage, is the one in the crime watch of 26 February 83, you haven't saw those letters.

So far the government hasn't done a thing. The lawyers won't say, one word, other than, behind my cell in the pipe alley Q-2-W-5.

I would guess the whole world knows about this, crisis, because it's been on radio, for months now. I'm okay. Just trying to get my family out this prison. Thought Gail had gone crazy, bothering my family, lawyers, with these people, and prison guards.

I've written every prison official, in Tallahassee, and not one thing has been done. Even the governor and Jim Smith.

Stamps and paper, running very low, the problems with legal packages regular packages, pass X-mas packages, items from the store (prison), television, radio, newspapers, magazines, etc . . . is the same.

Also DC, Disciplinary Confinement, but as well as ever. Schedule an interview, whenever you can, "Reaching out," "Amnesty International," asked if I had written the Clearinghouse, just decided to do so. Tell the staff, hello and everyone else. Have written quite a few people the pass time. I try to work on my death case, in which, I'm finding out some interesting, facts. Just learned.

Very difficult, to show a positive outlook, on the capital punishment, situation. With the death row inmates, committing crimes, in prison, testifying to the public, destroying that image, I've tried to maintain, in showing, the state should not kill, these inmates, on death row.

For the first time, we have the lawmakers, take a look at death row, and look at what we get. Rape, attempted extortion, assault, among other crimes, which will make it that much difficult, for these stays of execution.

God knows, I've tried my level, best, to show, lawmakers, they shouldn't kill me. Then try to protect the others, by giving the State of Florida, my life, to show the world, how wrong this death penalty is.

God has blessed me, in this crisis, to have known, some great people. I would not, otherwise, have known. Pray God they will remain, in our cause.

People are real strange, even though who work at this prison. As you can see, I never lied, to you, or Middleton, Hill, Esq., Fins, Esq., or Rowland.

All I can do now, is pray God, everyone will make it out of this crisis safe. Don't ever worry about me, my God is too strong.

Do give my regards to everyone, I'll just wait around, and see what happens, this is all I can do, at this point.

Write as many people as possible, about this crisis, my God has brought help, in attention, in our cause, in fighting capital punishment.

Content in knowing, my name will be, left in some respect, of the shame, I've cause others, including my family, in my being on death row.

Have very little paper, but will try to write more often. God bless you, and the staff of the FCJ, give everyone my regards, including Rowland.

Sincerely, Alvin B. Ford.

Appendix I, Letters, T.

Q. Gradually, in these days and weeks that followed these letters, anger gave way to grandiosity. For example, less than one month after Mr. Ford wrote Ms. Holdman, Mr. Ford wrote an attorney in Miami, Randall Berg,

Dear Mr. Berg:

I was given your name as a source to contact concerning the hostage crisis, by Beryl N. Jones of the ACLU Washington, DC.

I'm sure you have information on the hostage crisis, at Florida State Prison, this is day 287, the Ford family, lawyers, news reporters, senators, Senator Kennedy and many other leaders.

This crisis has to end, it is causing the racial unrest in your city, namely Liberty City. To curve the crime rate, we will need your help.

Please do not disregard this letter. Your national political leaders, are here inside the walls, of Florida State Prison.

Please brief yourself, by contacting CBS Channel 4, Eyewitness News, WJXT, Jacksonville, Florida. Also Jerri Hamilton, ABC Radio News, Dave Barret, Rita and staff. Also President Reagan.

You will have to bring someone, with you a lawyer, call CBS Channel 4 WJXT.

Do not disregard this letter, you will have to schedule an interview with Alvin Bernard Ford No. 044414.

This is day 287. Do reply by United States mail.

Sincerely, Alvin Bernard Ford A/K/A Sherlock.

cc: U.S. Attorney General
President Reagan

Appendix I, Letters, U. As this letter made clear, the hostage crisis was still growing worse by the end of April, 1983. Moreover, the hostages by then included "senators, Senator Kennedy, and many other leaders," and the crisis was of such global importance that it was shaping the events of history. Indeed by May 8, 1983, the list of hostages included some 135 people, many of whom were nationally-known public figures. See Appendix I, Letters, V.

R. As Mr. Ford's delusions became increasingly grandiose, a new element entered the delusions: Mr. Ford felt that he was becoming powerful enough that he himself could end the crisis and force the release of the hostages and thereafter, punish those responsible. The development of this element was apparent in a letter to Attorney General Jim Smith on May 10, 1983.

Dear Mr. Smith:

I know the Department of Corrections is well aware of this hostage crisis, as well as your offices. We have spoken over the FCC in November at the FSU football game (1982) concerning this crisis. You were with Joy Shearer and Governor Graham, some six months ago.

This is day 317, my family and lawyers have been held hostage. The Department of Corrections has endangered the lives of my family, lawyers, and news reporters, from the institution level to the state level.

Please schedule an interview with Alvin B. Ford, Florida State Prison No. 044414. Report all findings to President Reagan, and the United States Attorney

General and Ed Austin, District Attorney, Jacksonville, Florida.

....

As you know, Gwendolyn Louise Ford Shaw Williams RN had a baby inside the prison walls in these pipe alleys. The baby's at the clinic. Also my sister-in-law, Elsa Marie Perkins Ford (United States Army) had a baby while living in these pipe alleys. Thank God they were pregnant before being kidnapped.

...●

I have fired a number of officials at the institutional level and state level, with the final approval, from the Governor, and President of the United States. Also your offices.

There will be a number of lawsuits, criminal charges, all listed on the Federal Communication Commission. Also there will be testimony before a Presidential Subcommittee, on this hostage crisis.

Also please note, I write crime watch on CBS Channel 4, Eyewitness News. Please note the crimewatch of 26 February 82. I wrote these letters on these murders for President Reagan, he called a "grace period," will please try under these same persons have, my family, lawyer, reporters and our country's leaders hostage, inside Florida State Prison, Q-Wing, in these pipe alleys.

I'm not sure, how many persons, are inside these pipe alleys, through the prison, but I think there, is others, on other wings, although, I'm not sure, because I'm inside the cell.

I have request prison officials to call the FBI. Hopefully we know (government) how many persons, have been taken hostage. Some have been here since August of last year.

I have been in solitary confinement, since July 82. The President of the United States, Mr. Reagan and the United States Attorney General, know everything about this case.

Each person at the institutional level know, full well, the rules of DOC, being employed by the State of Florida. I have fired everyone, I've written, the final approval, will be from the President of the United States, Mr. Reagan, and the United States Attorney General, at DOC both the institution level and state level.

....

Sincerely, Alvin B. Ford A/K/A Sherlock

cc: U.S. Attorney General
President Reagan

Appendix I, Letters, W. As this sense of his own power grew, Mr. Ford summoned national and international leaders to Florida State Prison "to help end this hostage crisis." For example, on May 19, 1983, Mr. Ford wrote Justice Sandra Day O'Connor as follows:

Dear Madam Justice O'Connor:

I have been waiting on your reply, to my pass correspondence. Please give all Justices a copy of my 11 March 83, letter and 23 April 83 letter.

Please each Justice follow, the directions of this letter, Steward, Blackman, Powell, Stevens, Marshall, Brennan, Burger, White, Rehnquist.

Each will have to travel to Jacksonville, Florida. The mayor of Jacksonville, will meet each at the airport, with CBS, ABC, NBC television stations.

All this nation's leaders, have assembled in Jacksonville, Florida. CBS Channel 4 Eyewitness News, will bring you. We need you to help end this hostage crisis. Also contact ABC radio news.

Then each of the following, Senator John Glenn, Walter Mondale, Senator Gary Hart, Senator Ernest Hollings, Senator Cranston, President Reagan, Senator Edward Kennedy, Julian Bond, Rev. Jesse Jackson, Reubin Askew, Benjamin Hooks NAACP, Ted Koppel ABC Nightline.

There are kings and queens, Prime Minister Margaret Thatcher, many of our nations leaders, each Justice. Please reply by United States mail.

Sincerely, Alvin B. Ford A/K/A Sherlock

cc: U.S. Attorney General
President Reagan

Appendix I, Letters, X. *See also* Appendix I, Letters, Y (similar letter to Judge Joseph W. Hatchett, United States Court of Appeals for the Eleventh Circuit).

S. By July 27, 1983, the hostage crisis seemed to be nearly over. Mr. Ford wrote Gail Rowland on that date, reporting much success in resolving the crisis. Significantly, Mr. Ford's view of his own power and national/international esteem was also continuing to grow. Mr. Ford began to refer to himself as "Pope John Paul, III." In this "resolution phase" of the hostage crisis, Mr. Ford for the first time was also beginning to allow himself to think about other matters—some of which were clearly delusional and some of which were not.

Dear Rowland:

I am replying to your 12 May 83 letter on the above date. Thank you for the legal supplies, I did, in fact, receive them. Sorry I didn't write. Since you have been standing outside my door, I pass, the writing.

I have been in the need for legal supplies, for months. You know, very well of the problems you have created. This hostage crisis is in day 377.

LABILE COPY

I've written Counselor Harrington for 1061 forms for legal supplies, and he refuses to send them. So he is fired and under arrest, as the others.

This investigation has been very successful, and to the exact point of my pass letters. It's unfortunate so many, prison personnel will be cast in prison.

Thankfully the CIA/FBI was in fact able to investigate UCI, the Attorney General's Office, all level of state and federal court. The Florida State Supreme Court, I've appointed new Justices, I appointed nine.

Especially UCI's investigation of the Fort case, of the pass 60 minutes, we even have the staff of UCI thinking with all intentions, they are holding my family hostage, for extortion.

Thank God they did the things they, because no human being will ever forget, the shame and mental suffering. Each their arrest, excuse, will seek their arrest.

The questions I asked you about my family you state, "You can't answer," well explain, "Why you can't answer." How could could you be confused, about what's going on in the prison. I am still on DC, this is the 352 day, I have been in the need for many things, but passed. I'll survive this crisis.

Do you know Patti Reagan? What kind of wife do you think she will make. Thinking about asking her to marry me. You may see it in the newspaper, magazines, on the news each day. Be sure to look at the gifts I'm leaving, daily at the White House, 100 each day, for 100 days.

Hopefully she will say "yes," send her a teletype, for me.

I need the 1983-1984 football schedule, college and pro. Also I need you to get a weekly copy of "Doc's

Football Sports Journal," send it in the mail. Use regular mail. Each week.

Then a copy of point wise, and the weekly newspaper column, on college and pro lines. Point spreads. Also gold sheet. This will be in regular mail. This is too important, for you not to fill this request.

Do be in touch.

Sincerely, Alvin B. Ford A/K/A Sherlock, Pope John Paul, III

Appendix I, Letters, Z.

T. In the last letter which is available from Mr. Ford, dated November 28, 1983, the hostage crisis appeared to have been resolved and was referred to only in passing. Mr. Ford was still grandiose, referring with irritation to his "aides'" failure to review his letter, but his delusional system seemed to have changed significantly in content. For example, he seemed to have picked up ten wives in recent months. Moreover, his form of communication was becoming quite esoteric and incoherent, as commonly occurs in severely psychotic individuals.²

Dear Mother,

Its been a while, since I wrote, but there was no need, with this government, or rather this state, having so many problems.

Couldn't imagine this state, and the U.S. Government could be so, corrupt. Also the other countries of this, universe. Excuse the above mistakes, rushed and making notes for the service. If my aides, were at

² See *DSM-III*, *supra*, at 183: "Where loosening of associations is severe, incoherence may occur, that is, speech may become incomprehensible. There may be poverty of content of speech, in which speech is adequate in amount but conveys little information because it is vague, overly abstract or overly concrete, repetitive, or stereotyped."

hand, the mistakes would have been cleared. So overlook them.

Expect some lawsuits about this letter so, to all, concerned, be well informed.

If you can send some money and stamps, say whatever, you can, I have asked Wife 1, Britian, she said \$400.00, Wife 2 \$500.00, Sandra Wife 3 said \$1.00, Wife 4 said \$300.00, Wife 5 \$600.00, Wife 6 said \$200.00, Wife 7 \$100.00, Wife 8 (no reply) Wife 9 said (it's a damn insult) Wife 10 said, (No comment).

Also send some stamps, they're 30 cents so, listen you take care. Laugh God won, Daniel won, page 7 one 2 one, 6 one fort note D won, right one wrong one, wrong one right one. D one 3 one $\frac{1}{2}$ one, years one.

Can't imagine people can try, what they have. Need anything. No never, as long as my family and wives are safe.

Rushed so the letter, shall be review by reporters, mistakes? Note private. Aides tapes, etc. . . . Take care.

Love you, Sherlock.

Appendix I, Letters, AA.

The Interviews By Dr. Amin

U. Counsel for Mr. Ford initially arranged for Dr. Jamal A. Amin, a psychiatrist from Tallahassee, to evaluate Mr. Ford in July, 1981, in connection with pending clemency proceedings. Even after clemency had been denied, counsel asked Dr. Amin to continue seeing Mr. Ford, for therapeutic purposes, because of the deterioration of Mr. Ford's mental health which began in December, 1981. Dr. Amin continued to see Mr. Ford until August, 1982. At that point Mr. Ford came to believe

that Dr. Amin was conspiring against him, in concert with Gail Rowland and the Ku Klux Klan, and would no longer see Dr. Amin. On the basis of his four "in-person evaluations" of Mr. Ford over this fourteen-month period, together with his review of Mr. Ford's letters, a taped conversation between Mr. Ford and his attorneys, reports of various persons who had the opportunity to observe Mr. Ford's behavior directly, and Mr. Ford's prison medical records, Dr. Amin reported the following "SIGNIFICANT FINDINGS RELATED TO MENTAL STATUS":³

(1) During the last psychiatric evaluation—the examiner was impressed with the feelings of "emotional distance" and an inability to establish a previously on-going empathic rapport.

(2) Affect and moods are no longer appropriate or adequate to Mr. Ford's present situation indicating some disturbance in the regulation of his affect or emotions.

(3) The content of Mr. Ford's speech increasingly leans toward the symbolic, the esoteric, and the abstract.

(4) Episodes of the abrupt blocking of the stream of thought when Mr. Ford ceases to speak in the middle of a sentence.

(5) Mr. Ford has difficulty in organizing his thoughts by the usual rules of universal logic and reality. His associations are loose, his attention span is diminished, and he appears unable to prevent the intrusion of irrelevant material into his thought processes. Also, he has difficulty in maintaining appropriate levels of abstractness as he accentuates obscure features while ignoring central issues. This decrease in his

³ These findings are excerpted from Dr. Amin's report of June 9, 1983, a copy of which is included in Appendix I.

abstract attitude has been accompanied by an increase in his concrete thinking.

(6) Mr. Ford is unable to differentiate fantasy from reality and his fantasies become part of the basis for his delusions. He relates fantasies which indicate that he feels his thoughts are being controlled or influenced by "outside forces" such as a female disk jockey in Jacksonville, Florida.

(7) Mr. Ford has developed complex, yet logical paranoid and delusional systems usually after the false interpretation of some actual occurrence. His paranoia and delusional thinking have centered around "the Ku Klux Klan", nonexistent love affairs with any female showing interest in his predicament, and secret messages from the radio, television, and books.

(8) There are convincing and consistent indications that Mr. Ford suffers from auditory and visual hallucinations. He has consistently maintained that he sees and hears incidents on his cell block involving his mother's murder; an unidentified inmate threatening to kill him with a gun, knife, or cleaver; and an unidentified woman repeatedly being beaten and raped. Reality testing does nothing to shake Mr. Ford's faith in his hallucinations which were first reported approximately twenty months ago. Prison guards and other Death Row Inmates have reported episodes of Mr. Ford speaking out loud and angrily to seemingly nonexistent persons.

(9) There is strong evidence of suicidal ideation both past and present.

(10) Florida State Prison Medical Records indicate that Mr. Ford has been treated for "Peptic Ulcer Disease" since 1978 and that there was one instance of treatment for an "Agitated Depression" in 1982.

His medical records also reflect numerous stress related somatic complaints such as chest pains, joint pains, and skin reactions.

(11) There is a documented history of severe drug abuse of substances such as Cocaine, LSD, Alcohol, and Amphetamines.

(12) Mr. Ford appears to have very little insight into the fact that he has any emotional problems and goes to great lengths to deny mental illness.

The Interview and Evaluation by Dr. Kaufman

V. In January, 1983, counsel for Mr. Ford asked Dr. Harold Kaufman, of Washington, D.C., to consult with us concerning Mr. Ford's progressively deteriorating mental health. There were three reasons for the consult at that point in time. First, Mr. Ford was beginning to say with some frequency that he wanted to dismiss his appeals and be executed. Because counsel believed that his desire to do this was the product of his mental illness, counsel did not believe he was competent to make such a decision. However, expert opinion was needed to support these views in the event that Mr. Ford insisted on pursuing this course. Second, because by that time, Dr. Amin was perceived by Mr. Ford as a co-conspirator against him, and for that reason, Mr. Ford would not see Dr. Amin, counsel decided that a psychiatrist other than Dr. Amin must be engaged. And third, Dr. Kaufman is highly respected in forensic psychiatry and came highly recommended. See Dr. Kaufman's curriculum vitae, included in the Appendix I.

W. Even though Dr. Kaufman was available to evaluate Mr. Ford in January, 1983, he was not able to do so then, or for a number of months thereafter, because Mr. Ford would not agree to see him. Indeed, between January and October, 1983, Mr. Ford refused to see nearly everyone who tried to see him—counsel, family members,

and friends. By mid-October, however, Mr. Ford again seemed willing to see whoever wished to see him, and at this time, agreed to see Mr. Kaufman. By the time Dr. Kaufman conducted his in-person interview with Mr. Ford, therefore, he had known about Mr. Ford for ten months and during that time, had reviewed much of Mr. Ford's correspondence and had listened to approximately three hours of taped interviews between Mr. Ford and counsel. Accordingly, Dr. Kaufman approached the interview with a good deal of knowledge about Mr. Ford.

X. Dr. Kaufman interviewed Mr. Ford for three hours on November 3, 1983, and reported the content of the interview as follows:

Mr. Alvin Ford entered the interview room in apparent high spirits and bantered for about fifteen minutes with you [Richard Burr] and Professor Wollan. He generally ignored me and my occasional questions. It should be noted that your and Professor Wollan's presence was deemed necessary by me to allow the interview to progress at all because of Mr. Ford's previous (and I understand subsequent) extreme reluctance to be interviewed. I also suggested your presence in order to set him more at ease so that he would be more inclin[ed] to be trustful, open and relaxed with me, whom he had never before met.

After about fifteen minutes of questioning by him and answers by the two of you he turned to me and said, "You a good guy? You OK?" I replied that I thought I was "OK."

Up to this point his questions had been disjointed, and had ranged from personal details ("food's OK—how you eat'") to delusional questions ("When's CBS comin' in here."). But after 15 minutes the incoherence of his mental associations and the almost totally delusional nature of anything to do with his case emerged as his facade crumbled. One thought

led to another with no seeming relation to the previous one with such rapidity that I have come to the conclusion that there is no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance to induce me to believe him to be psychotic or incompetent to be executed.

It is unfortunate that no tape, especially a videotape, exists to preserve for concerned observers the obvious fact that he was not "acting" for my benefit—or for his own. I think the best way to convey the spontaneous and psychotic nature of his ramblings is to simply record them (see below). These are not selected passages, but a stream of consciousness, either spontaneously rendered or spoken in response to a previous question. It is to be noted that there was very little animation or feeling in Mr. Ford's voice as he spoke, only a kind of "flatness" or lack of intensity of affect.

Mr. Ford **: The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch . . . there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me—Sinatra, Hugh Heffner, people from the dog show, Richard Burr, my sisters and brothers trying to sign the death warrants so they don't keep bothering me . . . I never see them, I only hear them especially at night. (Note that Mr. Ford denies *seeing* these people in his delusions. This suggest that he is honestly reporting what his mental

** Comments in parentheses are my own.

processes are.) I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley) . . . you can't evaluate me. I did a study in the army . . . alot of masturbation . . . I lost alot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to—Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other countries and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

At this point I should comment that none of this "idea salad" is out of context. Indeed there is no apparent context for these ramblings, disorganized delusional bits of ideational material.

I asked, "Are you going to be executed?" Mr. Ford replied, "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over."

Dr. Kaufman (Q): Are you on death row?

Mr. Ford (A): Yes.

Q Does that mean that the State intends to execute you?

A No.

Q Why not?

A Because Ford v. State prevents it. They tried to get me with the FCC tape but when the KKK came in it was up to CBS and the Governor. These prisoners are rooming back there raping everybody. I told the Governor to sign the death warrants so they stop bothering me.

Appendix I, Kaufman Report, at 1-3.

Y. On the basis of his interview with Mr. Ford and his familiarity with Mr. Ford's history over the previous two years, Dr. Kaufman concluded that Mr. Ford

is suffering from schizophrenia, undifferentiated type, acute and chronic. The delusional material, the free-floating and disorganized ideational and verbal productivity, and his flatness of affect are the highlights of the signs leading to this diagnosis of psychosis. The possibility that he could be lying or malingering is indeed remote in my professional opinion.

Appendix I, Kaufman Report, at 3.

Z. Further, in response to counsel's request to assess Mr. Ford's competency to be executed in light of his opinion that Mr. Ford suffers from schizophrenia, *Dr. Kaufman concluded that Mr. Ford was incompetent:*

You have asked me to relate Mr. Ford's psychiatric condition to several standards which might be used to determine his competence to be executed. It is my conclusion, using the Florida Statutory standard you have supplied me with, that because of his psychiatric illness, while he *does* understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the Governor and control him, President Reagan's interference in the execution process, etc.

Moreover, it is my conclusion that the disorganized state of his thinking is sufficiently severe to prevent Mr. Ford from being executed under the *Solesbee v. Balkcom* standard of Justice Frankfurter which you forwarded to me. In particular, Mr. Ford's "defects of facilities" prevent him from being capable of understanding "the purpose of his punishment."

In summary, it is therefore my professional opinion, based on my interview with Mr. Alvin Ford, that he is suffering from schizophrenia, undifferentiated type, acute and chronic, which is of such severity that he cannot sufficiently appreciate or understand either the reasons "why the death penalty was imposed on him" or "the purpose" of this punishment. It is therefore my opinion that Mr. Ford is incompetent to be executed.

Appendix I, Kaufman Report, at 3-4.

The Interview By Wollan, Rowland, and Vandiver

AA. Following the interview with Dr. Kaufman on November 3, 1983, Mr. Ford again entered a period of time when he refused to see anyone seeking a visit with him. Mr. Wollan attempted to see Mr. Ford on November 18, and Mr. Ford abruptly and angrily left the interview after only ten minutes. Again on December 8, Mr. Wollan, accompanied by a paralegal (and friend of Mr. Ford), Margaret Vandiver, attempted to see Mr. Ford, but Mr. Ford refused to come to the visiting area. And again on December 15, 1983, Mr. Wollan, accompanied this time by Margaret Vandiver and Gail Rowland, attempted to see Mr. Ford. On this occasion, Mr. Ford did come to the visiting area and stayed for a few minutes. However, the content of this interview was quite different from any that had gone on before. While Mr. Ford's associations had become increasingly "loose" (see *DSM-III* in the Appendix I) during the course of his illness, in the interval between November 3, and December 15,

1983, his loosening of associations became "severe" (see *DSM-III*, at 182), in much the same way as Mr. Ford's letter of November 28, 1983 to his mother (*supra*, at pages 36-37) demonstrated a severe loosening of associations. The interview on December 15, 1983, transcribed from a tape recording, consisted entirely of the following:

Mr. Wollan How are you Alvin?

Mr. Ford (no response)

Mr. Wollan Do you mind if I sit a little closer with this mike?

Mr. Ford (no response)

Mr. Wollan What's the matter, Alvin? Are you going to sit there and not talk? What's troubling you? Alvin, it seems to me there's a lot in there you need to say and just sitting here and glowering at us is not going to help.

Mr. Ford (no response)

Mr. Wollan What would you like us to know? What would you like us to do?

Mr. Ford (kicks foot toward Mr. Wollan, showing bottom of flip flop)

Mr. Wollan What's that mean?

Mr. Ford (no response)

Mr. Wollan What's the trouble?

Mr. Ford (no response)

Ms. Rowland You have your jacket on. Are you cold? It's a little cool today. Are your feet cold in just the flip flops? I know I was pretty cold outside. We had to wait a few minutes outside before we could come in and it was chilly.

Mr. Ford Code one.

Ms. Rowland I'm real glad to see you. It's been a long time. I'm so glad you were able to come out. Are you still angry with me?

Mr. Ford No one.

Ms. Rowland No? It's been so long, I'm glad I was able to come here today and see you. I hope that we can talk some because I know you've been having a real hard time and I want so badly to be able to help. I haven't heard from you in a long time.

Mr. Ford Code one.

Ms. Rowland You need to tell me a little more than that because I'm not sure what you mean.

Mr. Ford Killed one.

Ms. Rowland I still don't understand.

Mr. Ford Killed one. Break one.

Ms. Rowland Killed one, break one?

Mr. Ford No one. Dead one.

Mr. Wollan Alvin, what does that mean?

Mr. Ford (no response)

Ms. Rowland I'm not sure what you mean. Can I sit a little bit closer? Will that bother you?

Mr. Ford No one.

Ms. Rowland Okay. I'll move my chair, my stuff . . . I brought my notebook in case you had anything you wanted me to write down. So you just tell me if you have something you want me to write down.

Mr. Ford State one. Electric one.

(pause)

Code one, take one.

Ms. Rowland Do you want me to write this down?

Mr. Ford Take one, off one. Code one, take one, say one, threaten one. Code one, off one.

Mr. Wollan Alvin, who should we tell this to?

Mr. Ford (no response)

Mr. Wollan Is there somebody who will know what this means?

Mr. Ford (spits in Mr. Wollan's direction, but not on him)

(pause)

Ms. Rowland Do you have anything else? I know there's something you'd like to say. Did you get my Christmas card?

Mr. Ford Seen one.

Ms. Rowland Did you get your birthday card, too? I sent you a birthday card.

Mr. Ford No one.

Mr. Wollan Have you been getting letters from your mother, Alvin?

Mr. Ford Jesus one.

Mr. Wollan Did you get my letter this week?

Mr. Ford No one.

(pause)

Write one.

(pause)

Ms. Rowland You've lost a lot of weight since I saw you last. Have you not been very hungry?

Mr. Ford Yes, one.

Mrs. Rowland Don't you like the food here?

Mr. Ford No one.

Ms. Rowland Well, it doesn't always look too good.

Mr. Ford Certainly one.

Ms. Rowland You should eat a little, though, so you don't get sick.

Mr. Ford Say one.

(pause)

Ms. Rowland I'm glad that you came out. I was worried that you might not because I knew Larry and Margaret were here about a week ago . . .

Mr. Ford (grunts)

Ms. Rowland But you came out today. I'm glad. I'm real glad to see you.

Mr. Ford Night one.

(pause)

Today one.

Ms. Rowland Do you have any two's? Or is everything one's today?

Mr. Ford Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.

Ms. Rowland I have to turn the page.

Mr. Ford Leader one. Now one, say one, crazy one. Track one.

(pause)

God one. Kill one.

Ms. Rowland Have you seen any newspapers or anything in awhile?

Mr. Ford Yes one.

Ms. Rowland Did you read about the Pope?

Mr. Ford Looking one.

Ms. Rowland And Bob Sullivan and the Pope
...

Mr. Ford Looking one.

Ms. Rowland He made a nice statement. You
saw it. I was very moved.

Mr. Ford Hello one, need you one.

(pause)

Gail one, threaten one, kill one.

(pause)

Remember one, letter one? Say one, God one, blind
one, klan one, Destiny one?

(pause)

Mr. Ford Mine one. Stab one, say one crazy
one.

(pause)

Need one, love one.

(pause)

But one, starve one, damn one.

(pause)

Damn one, say one.

Ms. Rowland I see . . .

Mr. Ford Excuse one, need you one.

(pause)

Tell him one. Hello one.

Ms. Rowland I see what you're saying and . . .

Mr. Ford Review one, law one. Dead one.

(long silence)

Ms. Rowland I do remember all your letters and I've read them, but sometimes it's hard for me to understand what's happening with you.

Mr. Ford Need one. Love one.

Ms. Rowland I care about you. I love you, Alvin. I love you like my brothers, like my own family.

Mr. Ford Time one.

(stands up)

Ms. Rowland Where are you going?

Mr. Ford Little one.

Mr. Wollan You ready to go?

Mr. Ford (opens door for guards to get him)

Ms. Rowland May I say goodbye?

Mr. Ford Yes one.

Ms. Rowland I'm sorry you weren't able to see us any longer. Goodbye.

Mr. Ford Little one.

(leaves with guards)

The Interview and Evaluation By The Commission of Psychiatrists

BB. On December 19, 1983, just four days after Mr. Ford's interview with Mr. Wollan, Ms. Vandiver, and Ms. Rowland, the commission of psychiatrists appointed pursuant to *Fla. Stat. § 922.07*⁴ interviewed Mr. Ford for approximately thirty minutes. Based upon the individual commission members' reports, confirmed

⁴ Members of the commission were Dr. Peter Ivory (Chattahoochee), Dr. Umesh Mhatre (Lake City), and Dr. Walter Afield (Tampa).

by the observation of all those present for the commission's interview, Mr. Ford responded in the same manner to questions on December 19 as he had responded on December 15 in the Wollan, Vandiver, Rowland interview.

CC. On the basis of this brief interview with Mr. Ford, their subsequent observation of his cell, and their conversations with correctional officers about Mr. Ford, two of the three commission members concluded, as have Dr. Kaufman and Dr. Amin, that Mr. Ford suffers from psychosis. Dr. Mhatre concluded on December 28, 1983, that Mr. Ford suffers from "psychosis with paranoia." Appendix I, Mhatre Report. Dr. Afield concluded on January 19, 1984, that Mr. Ford suffers from a profound emotional illness that "forces me to put a 'psychotic' label on the inmate." Appendix I, Afield Report. Only Dr. Ivory, the third commission member, concluded that Mr. Ford does not suffer from psychosis or any other condition which impairs his ability to appreciate reality. Appendix I, Ivory Report.⁵ The members of the 922.07 commission found, however, that Mr. Ford was, notwithstanding his condition, competent under the test of competency prescribed by Section 922.07.⁶

⁵ It should be noted however that Dr. Ivory refused to review the history of Mr. Ford's illness, as documented in Mr. Ford's correspondence and as documented by the reports of Dr. Kaufman and Dr. Amin. Counsel offered Dr. Ivory these materials, but he refused to accept them until after the interview. Moreover, his report reflects no review of the materials. (Indeed, in light of his submission of his report to the governor the day after the interview with Mr. Ford, it is improbable that Dr. Ivory considered these materials at all.) The materials were accepted and reviewed by Dr. Mhatre and Dr. Afield. See Appendix I, Mhatre Report and Afield Report.

⁶ In the 922.07 proceeding before the governor, counsel and Mr. Ford demonstrated that the conclusions of the two commission members who found Mr. Ford psychotic but nonetheless competent was as flawed as the opinion of the third commission member who found Mr. Ford free of psychosis. Unlike the third commission member, the two who found Mr. Ford psychotic did review Mr.

Current Observations About Mr. Ford

DD. After December 19, 1983 Mr. Ford refused to see his lawyers or the paralegals who have worked on his case until May 23, 1984. During this time, he did not respond to correspondence; nor did he initiate correspondence.

EE. Insight is available into Mr. Ford's current mental state through two sources. The first is the person who had a death warrant signed on the same date as Mr. Ford, John O'Callaghan, who has been housed next to Mr. Ford since April 30, 1984. He has provided the following observations of Mr. Ford:

During the entire time we have been housed together Mr. Ford has acted and talked in a bizarre fashion:

- (a) Mr. Ford has repeatedly threatened to kill me and various guards. After he has made such threats, however, he will often ask me for a cigarette.
- (b) Mr. Ford talks to himself in a high-pitched voice. He then frequently gets into arguments with this "other" person which become violent fights, with Mr. Ford punching, rolling around, and struggling. At the end of these fights Mr. Ford is panting.
- (c) Mr. Ford frequently bangs his head against the wall and has fits, during which he is snorting and growling.

Ford's history and the prior psychiatric evaluations of Mr. Ford. However, in so doing, these commission members did not evaluate—indeed ignored—the delusions from which Mr. Ford suffered which bore directly upon his ability to understand why he was to be executed: the delusions which led him to believe that he was no longer under sentence of death. However, since no evidentiary proceeding was held by the governor, counsel for Mr. Ford has never been able to demonstrate—in an evidentiary sense—that the evaluations by the commission members were so flawed that their conclusions were worthless in comparison to the conclusions of Dr. Kaufman and Dr. Amin. As demonstrated in Appendix IIb, at Barnard Affidavit and Halleck Affidavit, counsel was prepared to offer such evidence.

(d) When his mail is given to him, Mr. Ford throws it on to the walk without ever reading it.

(e) Mr. Ford sometimes walks around his cell as if he were a robot.

(f) Every now and then Mr. Ford draws marks on the walls of his cell and touches the marks with various parts of his body.

(g) On May 18, 1984, when Mr. Ford was told that he had a legal visit, he responded, "Thank you one. Thank you one. Someone on J-Wing will see me."

During the time that we have been housed together, I have tried repeatedly to get Mr. Ford to talk sensibly with me. However, I have gotten no sensible response from him.

Appendix I, Affidavit of John O'Callaghan. The second is Dr. Harold Kaufman, who saw Mr. Ford again on May 23, 1984. Dr. Kaufman found that Mr. Ford had "seriously deteriorated" since he saw him on November 3, 1983; that Mr. Ford's paranoid schizophrenia had become severe; that Mr. Ford's contact with reality is now only minimal; and that Mr. Ford has no understanding of the fact that he is about to be executed. Further Dr. Kaufman found "highly unlikely" any possibility that Mr. Ford is malingering. See Appendix I, Kaufman Supplemental Report.

FF. The foregoing facts demonstrate that Mr. Ford is currently incompetent. His execution when he is incompetent would violate the eighth and fourteenth amendments.

(1) The right of a condemned person not to be executed when incompetent is well-established as a clear legal entitlement under Florida law. *Perkins v. Mayo*, 92 So.2d 641, 644 (Fla. 1957). That right is also protected by the eighth amendment's prohibition against cruel and unusual punishment. Under the two-part test for evaluating the eighth amendment constitutionality of

an aspect of the death penalty, *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977), the execution of the mentally incompetent is intolerable under contemporary standards of decency, and is violative of established constitutional doctrine requiring that a punishment must serve legitimate penological goals and not itself deprive the person punished of due process.

(2) The right of the condemned not to be executed when incompetent cannot, therefore, be voided without a due process proceeding in which the condemned person's competency is fairly determined. Only upon the conclusion of such a hearing, with the determination that the condemned person is competent, can the condemned person about whose competency there has been a reasonable doubt be executed.

(3) By providing only a proceeding before the Governor, in which there are no procedural due process protections, as the *exclusive* remedy for determining competency at the time of execution, *see* the opinion of the Supreme Court of Florida, May —, 1984, in petitioner's case, the State of Florida has thus provided no remedy that is consistent with the fourteenth amendment for the protection of the condemned person's right not to be executed when incompetent. Such a remedy must, therefore, be provided in connection with the proceeding *sub judice* if sufficient facts have been alleged to invoke that remedy.

(4) The facts alleged herein create at least a reasonable doubt about Mr. Ford's current competency, thus necessitating a due process inquiry into his competency. *See Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

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Other Required Information

22. All of the grounds presented herein were presented to the state courts in the collateral proceedings discussed in ¶¶ 12-14, *supra*.

23. There is no other pending proceeding, state or federal, which attacks the judgment and sentence complained of herein, except for the following: petitioner has something an appeal in the United States Court of Appeals from this Court's disposition of the remand of *Ford v. Strickland*, (No. 81-6663-Civ-NCR). As the court knows, a stay of execution in connection therewith was denied by this Court on May 18, 1984.

24. Petitioner has been represented by the following counsel in the course of proceedings related to the judgment under attack herein:

A. At all pretrial proceedings, trial, and on direct appeal, petitioner was represented by Bob Adams, who has offices in Mariana and Fort Lauderdale, Florida.

B. In the state and federal collateral proceedings which are described in ¶ 10, *supra*, petitioner was represented by Richard H. Burr, West Palm Beach, Florida, and Laurin A. Wollan, Tallahassee.

C. In every state and federal collateral proceeding since those proceedings, petitioner has been represented by Richard L. Jorandby, Public Defender of the Fifteenth Judicial Circuit, and various of his assistants.

WHEREFORE, petitioner prays that the Court grant all relief to which he may be entitled in this proceeding, including but not limited to:

1. a stay of the execution of his death sentence during the pendency of these proceedings;
2. the grant of sufficient funds to enable petitioner to present expert testimony and lay testimony necessary to prove the facts as alleged herein;
3. the grant of discovery as requested by separate motion submitted herewith;
4. the grant of an evidentiary hearing at which petitioner is present to enable him to prove the facts as alleged herein;
5. the opportunity to submit post-hearing briefs; and

6. The granting of this petition for writ of habeas corpus.

Respectfully submitted,

[Counsel for Connie Ford as next
friend for Alvin Bernard Ford]

[Names/Addresses of Counsel
Omitted in Printing]

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

[AFFIDAVIT OF NEXT FRIEND]

CONNIE FORD, being duly sworn according to law, deposes and says:

1. I am the natural mother of Alvin Bernard Ford. I currently live in Palmetto, Florida, and have lived in Manatee County, Florida, most of my life.

2. My son, Alvin, was born on September 22, 1953. Alvin lived with me at home until he graduated from high school. After his high school graduation, he moved to Gainesville, Florida, where lived until he was charged with the crime for which he is now on death row. During the time between his high school graduation and his arrest for this crime, my son and I were in frequent contact with each other by telephone and by mail.

3. My son was sent to death row at Florida State Prison in January of 1975. From that time until the end of October, 1982 I made frequent visits to the prison to see my son, and I corresponded with him regularly and frequently.

4. Until the summer of 1982, I knew of no mental health problem from which Alvin suffered. During the time he was growing up and living with me at home, he was never treated by a psychologist or a psychiatrist for any mental illness or disorder. As far as I knew, he suffered from no such condition. After Alvin left home, and even after he was sent to death row, I still knew of no mental health problem from which he suffered. This began to change, however, sometime during 1982.

5. In the summer of 1982, I first began to notice that my son was acting and talking in a very strange way. During a visit, he talked very strangely to me. He talked about marrying a girl at a radio station in Jacksonville who was later killed in an automobile accident. He also said that he saw the Klu Klux Klan set a house afire in Jacksonville where people were burned to death and that one of the Klansmen was staying at the prison. He also talked about seeing "the light" come through the ceiling of the house where the fire had been. After this visit, I began to think that there was something seriously wrong with his mind.

6. In my next visit with Alvin, on October 24, 1982, I felt certain that there was something wrong with his mind. In that visit, Alvin was very distant from me and from my daughter and her child, who accompanied me on the visit. He said over and over that we were not his family. After this had gone on for a while, I asked the correctional officers in the visitation area to let me and my daughter and granddaughter leave. Alvin was acting so strangely that I was bewildered and very upset. Alvin has refused to see me since that day.

7. Since that visit in October, 1982, I have received very few letters from Alvin. I have continued trying to write him during this period of time, but most of my letters are returned to me with a notation on the letters that Alvin has refused to accept the letters. In this period of time, I or members of my immediate family have received three letters from Alvin. In all of these letters, Alvin has talked about me and other members of my family being held hostage in the prison. In the last letter I received from Alvin, he also talked about a number of other things which made no sense to me. In these letters, Alvin has said the following:

(a) Letter of December 5, 1982, to Alvin's grandmother:

Dear Grandmother,

I received your letter and card. I haven't written because of a number of reasons. I hope you will be well, feeling okay when this letter, reaches your hand. I have been okay. But I want to tell you don't, ever be afraid, of my dying, because this will happen one day.

You mentioned your being 73 years old, well don't let anyone threaten you into doing anything, at all. If anyone can, hurt a 73-year old woman, they have to be really sick, so try to understand, and just believe in God, and ask him to forgive those, that do you wrong.

I know you are inside, this prison, behind my cell. I have been wondering, how you got in this prison, also with mother, Gwen, and the other relatives.

I have been more surprised, in your not telling me from the first day you were, brought in this prison.

God, put your trust in God, don't write, and tell me lies. This is the reason, I had such a time, finding out about all the family, from this prison cell. So don't do anything, against your will, you are not to be held hostage, in this prison, by these people. God, is the answer, so take care of yourself as well as humanly possible.

Hopefully you knee is better. Also you were able to have the x-ray. Tell Uncle Henry hello, also he must be held hostage here, also. Tell him, he should write.

I won't be having any visits, until all my relatives, are safely out of this prison, one way or the other. I know now, about the relatives, as well as the outside world, so trust in God.

I've given these people, every choice, possible, to let you, and the relatives go, but looks as though,

they refuse. So if they hurt anyone, the crimes, will surely, have a lasting effect.

Thank you for the stamps and God bless you, and keep you safe. Trust in no one, but God.

Sincerely, Alvin B. Ford A/K/A Sherlock.

(b) Letter of May 8, 1983 to me:

Dear Mother:

Here is a list of people trying to help, and there's many more. This postage stamp, showing the mail is illegal, or no stamp on the mail, stealing money from the U.S. Government.

This has been done some 315 days, stealing the mail from my cell door, then taking it, to the pipe alley on N-Wing, S-Wing, R-Wing and Q-Wing.

The world knows you are here and been hostage with y our family since July, 1982.

Thank God he has sent so many great leaders. This hounding was meant to drive my lawyers insane. Please listen to my lawyers no matter, what these prison people say.

There's FBI, I know about, so keep them safe, as they do you also try, no to bother, others, with the hounding. They do this because you don't know the full story. Trying to hurt my lawyers, sorry I had to say something. The lawyers are human, and hurt the same as you, even worst, because they see, how you have been hurt.

Just try to stay alive, do what Deborah Fins tell you, not matter what she would tell you anything wrong. . . .

Hopefully you are well. You have been 315 days inside Florida State Prison, with [the names of 135 people are then listed].

(c) Letter of November 28, 1983, to me:

Dear Mother,

Its been a while, since I wrote, but there was no need, with this government, or rather this state, having so many problems.

Couldn't imagine this state, and the U.S. Government could be so, corrupt. Also the other countries of this, universe. Excuse the above mistakes, rushed and making notes for the service. If my aides, were at hand, the mistakes would have been cleared. So overlook them.

Expect some lawsuits about this letter so, to all, concerned, be well informed.

If you can send some money and stamps, say whatever, you can, I have asked Wife 1, Britian, she said \$400.00, Wife 2 \$500.00, Sandra Wife 3 said \$1.00, Wife 4 said \$300.00, Wife 5 \$600.00, Wife 6 said \$200.00, Wife 7 \$100.00, Wife 8 (no reply) Wife 9 said (it's a damn insult) Wife 10 said, (No comment).

Also send stamps, they're 30 cents so, listen you take care. Laugh God won, Daniel won, page 7 one 2 one, 6 one fort note D won, right one wrong one, wrong one right one. D one 3 one $\frac{1}{2}$ one, years one.

Can't imagine people can try, what they have. Need anything. No never, as long as my family and wifes are safe.

Rushed so the letter, shall be review by reporters, mistakes? Note private. Aides tapes, etc . . . Take care.

Love you, Sherlock.

8. On the basis of everything I have known about my son all his life, I believe that he is severely ill. He had

no mental illness until sometime in 1982, beginning in that year, he became more and more ill. I am convinced that he no longer has the ability to protect himself or his interests. I believe very strongly that he no longer knows what may happen to him in prison or why it may happen to him. Because of these beliefs, and on the basis of the facts I have talked about in this affidavit, I believe that he needs me to protect his interests because of his inability to do so.

/s/ Connie Ford
CONNIE FORD
Mother of Alvin Bernard Ford

[Jurat Omitted in Printing]

[Verification Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[EXCERPT FROM APPENDIX TO PETITION FOR WRIT
OF HABEAS CORPUS: REPORT OF DR. JAMAL AMIN,
JUNE 9, 1983]

[Return Address/Greeting Omitted in Printing]

PURPOSE AND METHODOLOGY

Requested by Defense Attorneys to present my professional opinions regarding Mr. Alvin Ford's present mental status using the following paradigm—in spite of his refusal to currently cooperate with any mental health professional: (1) A total of four separate in-person evaluations at Florida State Prison commencing July, 1981 and ending August, 1982. (2) A recently taped conversation between Mr. Ford and his attorneys. (3) Recent letters written by Mr. Ford to Relatives, Attorneys, and Myself. (4) Interviews with relatives, attorneys, other inmates, prison personnel, and others with direct observations of Mr. Ford's behavior in the past three months. (5) July and August, 1982—Psychological Evaluations by Psychologists Pittman and Fleet. (6) August, 1982—Psychiatric Evaluation by Prison Psychiatrist Doctor Innocent. (7) Florida State Prison Medical Records.

CURRENT SITUATION

Mr. Ford is presently incarcerated on Death Row at Florida State Prison while his legal efforts proceed through the courts. He is not receiving treatment for any mental disorder in spite of gradual changes in his behavior first noted in December, 1981. He has steadfastly refused psychotropic medication and has become in-

creasingly withdrawn, uncooperative, and bizarre in his interactions with familiar persons.

SIGNIFICANT FINDINGS RELATED TO MENTAL STATUS

- (1) During the last psychiatric evaluation—the examiner was impressed with the feelings of “emotional distance” and an inability to establish a previously on-going empathic rapport.
- (2) Affect and moods are no longer appropriate or adequate to Mr. Ford’s present situation indicating some disturbance in the regulation of his affect or emotions.
- (3) The content of Mr. Ford’s speech increasingly leans toward the symbolic, the esoteric, and the abstract.
- (4) Episodes of the abrupt blocking of the stream of thought when Mr. Ford ceases to speak in the middle of a sentence.
- (5) Mr. Ford has difficulty in organizing his thoughts by the usual rules of universal logic and reality. His associations are loose, his attention span is diminished, and he appears unable to prevent the intrusion of irrelevant material into his thought processes. Also, he has difficulty in maintaining appropriate levels of abstractness as he accentuates obscure features while ignoring central issues. This decrease in his abstract attitude has been accompanied by an increase in his concrete thinking.
- (6) Mr. Ford is unable to differentiate fantasy from reality and his fantasies become part of the basis for his delusions. He relates fantasies which indicate that he feels his thoughts are being controlled or influenced by “outside forces” such as a female disk jockey in Jacksonville, Florida.

- (7) Mr. Ford has developed complex, yet logical paranoid and delusional systems usually after the false interpretation of some actual occurrence. His paranoia and delusional thinking have centered around "the Klu Klux Klan", nonexistent love affairs with any female showing interest in his predicament, and secret messages from the radio, television, and books.
- (8) There are convincing and consistent indications that Mr. Ford suffers from auditory and visual hallucinations. He has consistently maintained that he sees and hears incidents on his cell block involving his mother's murder; an unidentified inmate threatening to kill him with a gun, knife, or cleaver; and an unidentified woman repeatedly being beaten and raped. Reality testing does nothing to shake Mr. Ford's faith in his hallucinations which were first reported approximately twenty months ago. Prison guards and other Death Row Inmates have reported episodes of Mr. Ford speaking out loud and angrily to seemingly nonexistent persons.
- (9) There is strong evidence of suicidal ideation both past and present.
- (10) Florida State Prison Medical Records indicate that Mr. Ford has been treated for "Peptic Ulcer Disease" since 1978 and that there was one instance of treatment for an "Agitated Depression" in 1982. His medical records also reflect numerous stress related somatic complaints such as chest pains, stomach pains, joint pains, and skin reactions.
- (11) There is a documented history of severe drug abuse of substances such as Cocaine, LSD, Alcohol, and Amphetamines. #
- (12) Mr. Ford appears to have very little insight into the fact that he has any emotional problems and goes to great lengths to deny mental illness.

CLINICAL IMPRESSIONS AND DYNAMIC FORMULATIONS

Mr. Ford's above outlined list of at least twelve present and past abnormal signs and symptoms—coupled with the reality of severe on-going tensions and anxieties produced by Death Row confinement should be overwhelmingly convincing for a psychiatric diagnosis related to a "Paranoid Schizophrenic Breakdown".

Since there are no psychological tests for Schizophrenia which are comparable to an empirical test for something like Syphilis—it is not unusual for Schizophrenic patients to show the "normal psychological profile" which Prison Psychologists Pittman and Fleet obtained from administering psychological tests approximately ten months ago.

Mr. Ford's psychotic episodes which initially were intermittent have increasingly become sustained and in the typical pattern of psychiatric decompensation he goes to great lengths to deny any mental illness and to give the appearance of being mentally intact. Therefore, it is understandable how Prison Psychiatrists concluded "Malingering" because it is not unusual for "Functional Schizophrenics" such as Mr. Ford to muster enough "psychic glue" to remain mentally intact during periods of time when they are dealing with persons they distrust. However, prison reports of "Malingering" seem to ignore psychotic symptomatology noted in their own reports. For example, all prison reports state that Mr. Ford alleges that he sees and hears unusual things (auditory & visual hallucinations) and that he acquired a knife for his protection against an imaginary enemy (paranoia). Furthermore, prison evaluations which state that part of their reason for concluding malingering is based upon the "absence of psychological difficulties in the subject's history" are in error when one considers a Prison Psychiatrist's diagnosis of "Agitated Depression" and the prescribing of tranquilizing/anti-depressant medication known as "Sinequan". It should be noted that in the

typical fashion of someone experiencing psychotic decompensation—Mr. Ford was suspicious of his medication and refused to take it. Also, his history of drug abuse and treatment of Peptic Ulcer Disease would cast doubts on statements indicating no past psychological difficulties.

Mr. Ford's delusional thinking which cannot be corrected by reasoning or reality testing—represents a desperate attempt to regain control because he is strictly confined and feels harassed, powerless, and increasingly fragmented. He appears grandiose because he has deluded himself into feelings of exaggerated importance because so much effort revolves around his prosecution and defense.

Alvin Ford's suicidal ideation is dynamically related to the following factors: (1) The intense, on-going stress and anxiety of an impending electrocution. (2) Psychotic behavior which is becoming increasingly ineffective as a defense against overwhelming depression. (3) An unconscious desire to succumb to a mental disease so that himself and his socio-cultural community can better accept his disgraceful situation.

CONCLUSIONS

i.

In my professional opinion—Mr. Alvin Ford is presently suffering from a severe, uncontrollable, mental disease which closely resembles "Paranoid Schizophrenia With Suicidal Potential". This major mental disorder is severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life.

It should be noted that Mr. Ford's ambivalence around whether to continue his legal fight is in and of itself an indication of a psychotic disorder so severe that it suicidally compels him to embrace his own death.

RECOMMENDATIONS

- (1) Arrangements should be made for Mr. Ford to receive a complete Psychiatric, Neurological, and

Nutritional Work-up to rule out causes related to toxins, organic lesions, and/or Vitamin Deficiencies.

- (2) Psychotropic medication in a liquid or injectable form should be considered to ameliorate some of the more blatant symptomatology.

Respectfully submitted,

/s/ JAMAL A. AMIN, M.D.,M.P.H.
Psychiatrist/Nutritionist

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: REPORT OF
DR. HAROLD KAUFMAN, DECEMBER 14, 1983]**

[Return Address/Greeting Omitted in Printing]

I am writing this report in response to your request that I present the findings of my three hour interview with Alvin Ford which I conducted at Starke, Florida, on November 3, 1983, to determine his competency to be executed.

You will recall that both you and Professor Laurin Wollan, who has taken an interest in Mr. Ford's case, were present for about ninety minutes of the interview which took place in an interview room at the Starke Prison. I have received from you the standards for "competency for execution," and, as discussed below, have applied them to my psychiatric findings.

Mr. Alvin Ford entered the interview room in apparent high spirits and bantered for about fifteen minutes with you and Professor Wollan. He generally ignored me and my occasional questions. It should be noted that your and Professor Wollan's presence was deemed necessary by me to allow the interview to progress at all because of Mr. Ford's previous (and I understand subsequent) extreme reluctance to be interviewed. I also suggested your presence in order to set him more at ease so that he would be more inclined to be trustful, open and relaxed with me, whom he had never before met.

After about fifteen minutes of questioning by him and answers by the two of you he turned to me and said, "You a good guy? You OK?" I replied that I thought I was "OK."

Up to this point his questions had been disjointed, and had ranged from personal details ("food's OK—how you eatin' ") to delusional questions ("When CBS comin' in

here."). But after 15 minutes the incoherence of his mental associations and the almost totally delusional nature of anything to do with his case emerged as his facade crumbled. One thought led to another with no seeming relation to the previous one with such rapidity that I have come to the conclusion that there is no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance to induce me to believe him to be psychotic or incompetent to be executed.

It is unfortunate that no tape, especially a videotape, exists to preserve for concerned observers the obvious fact that he was not "acting" for my benefit—or for his own. I think the best way to convey the spontaneous and psychotic nature of his ramblings is to simply record them (see below). These are not selected passages, but a stream of consciousness, either spontaneously rendered, or spoken in response to a previous question. It is to be noted that there was very little animation or feeling in Mr. Ford's voice as he spoke, only a kind of "flatness" or lack of intensity of affect.

Mr. Ford** : The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch . . . there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me—Sinatra, Hugh Heffner, people from the dog show, Richard Burr, my sisters and brother trying to sign the death warrants so they don't keep bothering me . . . I never see them, I only hear them especially at night. (Note that Mr. Ford denies *seeing* these people in his delusions. This suggests

** Comments in parentheses are my own.

that he is honestly reporting what his mental processes are.) I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley) . . . you can't evaluate me. I did a study in the army . . . alot of masturbation . . . I lost alot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to—Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other counties and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

At this point I should comment that none of this "idea salad" is out of context. Indeed there is no apparent context for these rambling, disorganized delusional bits of ideational material.

I asked, "Are you going to be executed?" Mr. Ford replied, "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over.

Dr. Kaufman (Q): Are you on death how?

Mr. Ford (A): Yes.

Q: Does that mean that the State intends to execute you?

A: No.

Q: Why not?

A: Because Ford v. State prevents it. They tried to get me with the FCC tape but when the KKK came in it was up to CBS and the Governor. These prisoners are rooming back there raping everybody. I told the Governor to sign the death warrants so they stop bothering me.

Pulling this material together I have come to the conclusion that Mr. Ford is suffering from schizophrenia, undifferentiated type, acute and chronic. The delusional material, the free-floating and disorganized ideational and verbal productivity, and his flatness of affect are the highlights of the signs leading to this diagnosis of psychosis. The possibility that he could be lying or malingering is indeed remote in my professional opinion.

You have asked me to relate Mr. Ford's psychiatric condition to several standards which might be used to determine his competence to be executed. It is my conclusion, using the Florida Statutory standard you have supplied me with, that because of his psychiatric illness, while he *does* undersand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the Governor and control him, President Reagan's interference in the execution process, etc.

Moreover, it is my conclusion that the disorganized state of his thinking is sufficiently severe to prevent Mr. Ford from being executed under the *Solesbee v. Balkom* standard of Justice Frankfurter which you forwarded to me. In particular, Mr. Ford's "defects of facilities" prevent him from being capable of understanding "the purpose of his punishment."

In summary, it is therefore my professional opinion, based on my interview with Mr. Alvin Ford, that he is suffering from schizophrenia, undifferentiated type, acute and chronic, which is of such severity that he cannot sufficiently appreciate or understand either the reasons

"why the death penalty was imposed on him" or "the purpose" of this punishment. It is therefore my opinion that Mr. Alvin Ford is incompetent to be executed.

Sincerely yours,

Harold Kaufman, M.D. and LLB.
Psychiatrist

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: REPORT OF
DR. PETER IVORY, DECEMBER 20, 1983]**

[Return Address/Greeting Omitted in Printing]

Pursuant to Executive Order Number 83-197, accompanied by Doctors Afield and Mhatre, I examined inmate Alvin Bernard Ford from 10:50 a.m. to 11:25 a.m. at Florida State Prison on December 19, 1983. We later talked to prison officers, viewed the inmates cell, and talked to a prison psychiatrist.

The interview was conducted with great difficulty, from a verbal point of view, since the inmate responds to questions in a stylized, manneristic doggerel. Thus, an answer to a question might be "beckon one, cane one, Alvin one, Q one, King one".

It soon became apparent that our opinions would have to be based largely on inferential deduction from physical behaviorial observation, and only to a limited extent from his verbalizations.

From a behavioral point of view, then, the inmate entered the examination room in a quiet, cooperative, and appropriate manner. By helpful and responsive body movements, he helped the officer adjust the handcuffs. In an alert fashion he seemed interested and concerned about meeting the group of us, who also included attorneys and legal interns. When questioned, he answered promptly and then awaited the next question quietly and alertly. During his doggerel, and nonsensical, answers, if one of the examiners asked a question before he was finished, the inmate would raise his voice so as to dominate the situation and thus maintain control.

I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior, he showed that he is in touch with reality.

Later exchanges seem to bear this out, if one "reads between the lines":

Q "Are you aware they can electrocute you?"

A "Nine one, C one, hot one, die one"

A "Die one, gone one"

Q "Are your attorneys trying to prevent your death?"

A "Assasinate one, Bob Graham liable one, Jim Smith liable one, Senate one"

Q "What happens if you die?"

A "Hell one, Heaven one"

Q "Which?"

A "Hopefully it'll be Heaven, but if I listen, it'll be Hell"

And later:

A "If I die—no more fat cats

—no more homicide

—no more racism

—in Heaven with God"

Q "Are you crazy?"

A "Are *you* crazy (Said in such a tone as to indicate that he was no more crazy than I was)

At a time when we had been trying to establish if he read the Bible, he commented: "blood on the door posts, you know" (said with a knowing smile that indicated that he would be spared by the Angel of Death, Exodus 12:7)

By this time, I had formed the opinion that the inmate did comprehend the nature and effect of the death penalty and why it was imposed on him.

However, because of the severe adaptational disorder that had been developed by the inmate, by which he is trying to "hold at bay" on intolerable future that he cannot otherwise deal with, I decided to validate my ideas by examining his cell and talking to staff members. The rationale for this course of action was dictated by the

reasoning that if the inmate was truly as disorganized as he would have one believe, there would be ample signs of it in his environment. The results were as follows:

- 1) the cell was spotlessly clean and in order
- 2) his toilet articles were neatly arranged around the sink
- 3) his personal papers were all stacked neatly in the cell bars, arranged by category
- 4) his writings were extensive, and the choice of vocabulary showed a good intelligence
- 5) the arrangements were all logical, and there was nothing in the cell that seemed bizarre, as if he was out of contact with the real world
- 6) the officers stated that the inmate behaves normally in that he feeds himself, clothes himself and keeps himself clean. He utilizes the available resources to his maximum advantage.
- 7) he talks normally to the guards, but during the last week they have heard him practicing the strange speech from lists of words he had written in nonsensical order

To comment briefly, a natural insanity is not selective, but is pervasive. This inmates disorder, although severe, seems contrived and recently learned.

My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty.

From a humanitarian point of view, this inmate is obviously having enormous problems dealing with his possible destiny. It is suggested that a medical review to look into the feasibility of psychotropic medication

might be helpful, to allow the inmate to better assist his attorneys, and to set his affairs in order.

Please let me know if I can provide further information or be of other assistance.

Very truly,

/s/ Peter B.C.B. Ivory, M.D.
PETER B.C.B. IVORY, M.D.
Psychiatrist

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: REPORT OF
DR. UMESH MHATRE, DECEMBER 28, 1983]**

[Return Address/Greeting Omitted in Printing]

As per your order I examined Mr. Alvin Ford, on December 19, 1983 at Florida State Prison, along with my distinguished colleagues, Dr's. Peter Ivory and Walter Afield. Following is the summary of my evaluation with my conclusions:

Mr. Ford was evaluated at 11:00 a.m. in the courtroom of Florida State Prison. He was appropriately dressed, and exhibited good eye contact with all the people in the room, he did not exhibit any stranger anxiety or fears. He settled down in a chair, accompanied by his lawyers, and his friends through the Florida Clearinghouse on Criminal Justice. As per prior arrangement, Dr. Afield began to ask him questions. Mr. Ford did not initially respond but did so after his lawyer encouraged him. Most of his responses to the questions were bizarre. He continued to respond by jibberish talk such as "break one", "God one", "heaven one". However, throughout these bizarre responses, Mr. Ford kept good eye contact with the examiners. After awhile, his responses to questions became a little more appropriate indicating that he did understand the meaning of the questions asked of him, even though his responses remained somewhat bizarre. Throughout the interview which lasted about thirty minutes, there was no evidence of any hallucinations and Mr. Ford exhibited good ability to concentrate. He was relaxed and did not exhibit any physical aggression. In response to Dr. Afield's question, "what will happen when you die?", Mr. Ford responded "heaven one, hell one", indicating that he did understand the meaning of the question.

His mood appeared to be normal and affect was blunted. He did however smile and exhibited good range of affect

with his friends from his lawyer's office. His orientation and memory were not formerly tested, but he did appear to be oriented to people and place. He did not exhibit any suicidal or homicidal thoughts.

The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized.

The review of the extensive material provided by his lawyers including reports by Dr. Kaufman and Dr. Amin, and his correspondence with Gil Roland of Florida Clearinghouse and Criminal Justice indicate that Mr. Ford has been gradually decompensating since July and has worsened since the death of Mr. Sullivan.

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed upon him.

I may further add that considering his present state of mind, Ford is in need of appropriate antipsychotic medication, without such treatment he is likely to de-

teriorate further and may soon reach a point where he may not be competent for execution. I have discussed this with the psychiatrist of the Florida State Prison and hopefully, by the time you receive this report, Mr. Ford will be on appropriate treatment regiment.

Thank you for giving me the opportunity to be of some help to you. If I can be of any further assistance in the future, please do not hesitate to call upon me.

Sincerely,

Umesh Mhatre, M.D.

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: REPORT OF
DR. WALTER AFIELD, JANUARY 19, 1984]**

[Return Address/Greeting Omitted in Printing]

At your request, I examined Alvin Bernard Ford in the Florida State Prison, at Starke on December 19, 1983. As part of this evaluation, I reviewed the extensive records provided to me by legal counsel from your office. I had an in-depth conference with both attorneys for the inmate and reviewed the medical records that they had available. I talked at length with a variety of guards who had dealings with the inmate and reviewed the contents of Mr. Ford's writings in his cell. I discussed his medical condition with the prison psychiatrist and examined the man in the presence of all counsels and two other state-appointed psychiatrists. My examination consisted of a complete mental status examination. Subsequently, I spoke at length with Attorney Burr and reviewed complete medical records from the prison, which included psychiatric evaluations and reports from several prison psychologists. I reviewed in depth Dr. Kaufman's findings.

It is my medical opinion that Mr. Ford does indeed suffer from serious emotional problems. He is presenting himself in a very disorganized manner with a bizarre picture which does not fit any classical description of psychiatric illness. The nature of his disorganization is somewhat "put on," but the profoundness of it forces me to put a "psychotic" label on the inmate. Again, this is not a classical psychiatric diagnosis, but the man clearly is quite emotionally ill. Much of this had to do with the sentence that he is currently facing and his situation within the prison setting. On the basis of all the data and in light of the Florida Statute 922.07, it is my opinion that although this man is severely disturbed, he does understand the nature of the death penalty that he is

facing and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him. If there is anything further you wish please let me know.

Sincerely yours,

Walter E. Afield, M.D.

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: SUPPLEMENTAL REPORT
OF DR. HAROLD KAUFMAN, MAY 24, 1984]**

[Return Address/Greeting Omitted in Printing]

I am writing this report to summarize the findings of my examination of Alvin Ford at Florida State Prison in Starke on May 23, 1984.

The examination took place in a small room on the ground floor of the prison and lasted approximately two hours. As you recall you, Laurin Wollan, Esq., and Deborah Fins, Esq. were present during much of the interview.

Mr. Ford was in the interviewing room handcuffed when we arrived. He appeared to have lost at least twenty (20) pounds since I had last examined him on November 3, 1983. He was neatly dressed and was wearing rubber shower sandals. He did not greet the four of us as we entered and sat down. He sat with his body immobile and his handcuffed hands in a prayerful position in front of his mouth. Occasionally he moved his hands, still in the praying mode, to each of us for no apparent reason. His lips were pursed intermittently, but his head moved little. His eyes were closed or fluttering most of the time, although he occasionally glanced at one or more of us. His hands and fingers appeared to be trembling. We took turns asking him questions, and little or no response was forthcoming. He began muttering to himself after about five minutes. These utterances were largely unintelligible. This is the overall picture of what took place for two hours.

Because of his lack of responsiveness to the group, each of us tried speaking with him alone with the others out of the room. His utterances increased in number, but they remained soft mumbles. To the extent that they could be understood they were largely incoherent state-

ments about "God," "Hell," and a recitation of numbers. His hands remained in a praying position for the full two hours of the interview.

When I asked him whether he understood that the Governor of Florida had signed his death warrant and that he was to be executed on May 31, Mr. Ford gave no evidence of understanding what I asked him: his muttering continued and his hands remained in front of his face.

He occasionally motioned to be taken to the bathroom: it appeared that interaction with prison personnel was equally disorganized. The level of autism was much more profound than in November.

It is my conclusion based on this interview that Mr. Ford's condition has seriously deteriorated since November 3, 1983, when I last examined him. It is highly unlikely that he is malingering because he could not possibly know what the legal consequences of his behavior might be. Mr. Ford's condition, severe paranoid schizophrenia, has seriously worsened, so that he now has at best only minimal contact with the events of the external world. Accordingly, he has no understanding that he is soon to be executed, or what execution means, as a result of his psychosis. It is my opinion therefore that he is not competent to be executed under the provisions of Florida's statute.

Sincerely yours,

HAROLD KAUFMAN, Psychiatrist

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: AFFIDAVIT OF
SEYMOUR HALLECK, MAY 21, 1984]**

[Opening Jurat Omitted in Printing]

SEYMOUR L. HALLECK, being duly sworn according to law, deposes and says:

1. I am a professor of psychiatry in the School of Medicine at the University of North Carolina in Chapel Hill, North Carolina. My address is Department of Psychiatry, North Carolina Memorial Hospital, University of North Carolina, Chapel Hill, North Carolina.

2. For many years I have taught and practiced forensic psychiatry. During this time I have also published numerous articles and treatises on this subject. (A copy of my curriculum vitae is attached hereto).

3. On May 16, 1984, I was contacted by Richard H. Burr, from the Office of the Public Defender in West Palm Beach, Florida. Mr. Burr informed me that he represented a man named Alvin Ford who was on death row in Florida and was scheduled to be executed on May 31, 1984. He further informed me that Mr. Ford's competency to be executed has been in question since October, 1983. In this regard, he described to me the process by which Mr. Ford's competency had been evaluated by three psychiatrists who had been commissioned by the Governor of Florida, pursuant to *Fla. Stat. § 922.07* (1983), to assist the Governor in determining whether Mr. Ford understood the nature and effect of the death penalty and why it was to be carried out against him. Mr. Burr asked that I comment upon this process from the perspective of the standard of care which must be followed to render an adequate, reliable forensic psychiatric evaluation under the circumstances described.

4. The purpose of this affidavit is to provide the commentary requested by Mr. Burr.

5. In my review of the process followed by the 922.07 commission in evaluating Mr. Ford, I have examined the following:

(a) the documents provided by Mr. Burr to each commission member in advance of the evaluation of Mr. Ford;

(b) a transcript of an interview with Mr. Ford on December 15, 1983 which was similar in content to the commission's interview on December 19, 1983; and

(c) the written evaluations by the commission members.

6. In addition I have relied upon the following (provided by Mr. Burr) as the description of the process of evaluation followed by the commission:

The commission members appointed by Governor Graham to examine Mr. Ford were Dr. Peter Ivory (Florida State Hospital, Chattahoochee), Dr. Umesh Mhatre (private practitioner, Lake City), and Dr. Walter Afield (private practitioner, Tampa). The commissioners were scheduled to see Mr. Ford on December 19, 1983. On December 15, 1983, in order to orient the commission members to Mr. Ford's illness and to the reasons counsel for Mr. Ford thought he was incompetent, counsel sent a letter and a number of documents along with that letter to each commission member. Those documents included the following: an excerpt from the transcript of Mr. Ford's trial in December of 1974 in which Dr. David Taubel provided a psychiatric profile of Mr. Ford; a large sampling of correspondence from Mr. Ford over the previous two years which counsel for Mr. Ford thought provided the best history of Mr. Ford's illness that could be obtained; a psychiatric evaluation prepared in June, 1983 by Dr. Jamal Amin, a psychiatrist from Tallahassee; and a psychiatric evaluation prepared by Dr. Harold Kaufman, of Washington, D.C., in December 1983. When counsel

tendered these materials and his letter to Dr. Ivory, he refused to accept them. Dr. Mhatre and Dr. Afield did accept them.

On December 19, 1983, Dr. Afield, Dr. Mhatre, and Dr. Ivory conducted the interview of Mr. Ford in the courtroom at Florida State Prison. Present in the courtroom along with the three psychiatrists and Mr. Ford were Arthur Wiedinger (counsel from the Governor's Office), one or two correctional officers, two paralegals who had worked closely with Mr. Ford (Gail Rowland and Margaret Vandiver), and the two lawyers who had worked with Mr. Ford (Laurin Wollan and Richard Burr). The interview lasted approximately thirty minutes. During the course of the interview, the psychiatrists asked very simple, straight-forward questions attempting to solicit whether Mr. Ford understood the nature and effect of the death penalty and why the death penalty was being imposed upon him, and he responded in the same manner to these questions as he had responded in an interview by Mr. Wollan, Ms. Vandiver, and Ms. Rowland on December 15, 1983.

After approximately thirty minutes, the commission members determined that further interview of Mr. Ford would be fruitless and thus terminated the interview. Thereafter, they requested that they be able to examine Mr. Ford's cell. Their request was granted, and the three of them were taken back to Mr. Ford's cell. Their observations of Mr. Ford's cell and their conversations with correctional officers who were available to them in their visit to Mr. Ford's cell are recounted in their reports. Following their visit to Mr. Ford's cell, the commission members, or at least some of them, reviewed Mr. Ford's medical records and discussed his condition with the prison's medical staff. Following their review of medical records, the commission members concluded their on-site evaluation. Before leaving the

prison, Dr. Ivory, who had refused to accept the materials previously offered to him, requested that he be provided the materials. A copy was provided to him at approximately noon on December 19, 1983.

In the days that followed, the commission members prepared and sent their reports to Governor Graham. Dr. Ivory sent his report the very next day, December 20, 1983. In his report, he made no mention of having reviewed any of the materials counsel provided to him, and his evaluation reflected no knowledge of these materials. Dr. Mhatre and Dr. Afield, on the other hand, did report that they had reviewed these materials, and their evaluations reflected that they had done so.

7. In my opinion, the process of evaluating Mr. Ford's competency, as reflected in the foregoing account as well as in the material I have reviewed, fell below the generally accepted standard of care necessary to produce a reliable forensic psychiatric evaluation. The reasons for my opinion are as follows:

(a) The conditions under which the interview was conducted, including the amount of time spent interviewing Mr. Ford, were unlikely to produce sufficient data for reliable forensic evaluation. The interview was conducted in a courtroom, and a "room full" of people, including one or more correctional officers, was present. The environment was thus not conducive to the informal, intimate setting which is generally necessary to establish sufficient rapport for a psychiatric interview. In the setting described it would have been extremely difficult for Mr. Ford to fully reveal his problems or the nature of his illness. The thirty minute effort to establish communication under the conditions already noted was also inadequate. On rare occasions some patients can be accurately diagnosed in such a brief period. Mr. Ford's diagnosis, however, was not easily made due to the unusual nature of his behavior and his unusual method of

communicating. If the issue involved in the evaluation was simply an accurate medical diagnosis one or more hours of interviewing in a private setting would have been essential. Since there were difficult legal issues to be resolved, however, such as the nature of Mr. Ford's understanding of his situation, even more detailed examination was required. Furthermore, there was ample reason to suspect from previous psychiatric reports that Mr. Ford was difficult to interview and would not disclose himself early in an interview. In a letter from Mr. Burr, the examining doctors were urged to interview Mr. Ford patiently.

(b) One important requisite for conducting a reliable forensic evaluation may not have been adhered to in Mr. Ford's case. It is unclear if all of the available data concerning Mr. Ford's mental status were sufficiently considered.

(i) It is unclear whether Dr. Ivory considered the reports of previous psychiatrists or other available information in making his evaluation. It is clear that he did not have access to that information when he examined Mr. Ford. This lack of data could have seriously compromised the quality of his examination. It is also clear that Dr. Ivory does not refer to earlier psychiatric findings in his report.

(ii) While Dr. Mhatre's and Dr. Afield's evaluations both did take into account the history and previous evaluation of Mr. Ford's condition, both, as did Dr. Ivory's, failed to account for the facts contained in this history which were central to the forensic task at hand: whether Mr. Ford's delusional processes which, among other things, had led him to believe that he had won his case and could no longer be executed, were relevant to the issue of his incompetence, in that he failed to understand why he was to be executed or, as Dr. Kaufman put it, failed to understand "the purpose" of his execution. Dr. Kaufman had previously concluded that Mr. Ford was incompetent precisely because of these delusional

processes. Yet neither Dr. Ivory, Dr. Mhatre nor Dr. Afield dealt with this most crucial data in their reports.

8. In sum, therefore, I believe that the forensic evaluation of Mr. Ford by the 922.07 commission is unreliable because of its failure to be conducted in accord with the standard of care necessary for forensic psychiatric evaluation.

/s/ Seymour L.Halleck
SEYMOUR L. HALLECK

[Closing Jurat Omitted in Printing]

[Curriculum Vitae of Dr. Halleck Omitted in Printing]

**[EXCERPT FROM APPENDIX TO PETITION FOR
WRIT OF HABEAS CORPUS: AFFIDAVIT OF
DR. GEORGE BARNARD, MAY 21, 1984]**

[Opening Jurat Omitted in Printing]

George W. Barnard, M.D., being duly sworn according to law deposes and says:

1. Pursuant to a request by Richard H. Burr, III of counsel to the public defender, Fifteenth Judicial Circuit, West Palm Beach, Florida 33401, the following material was reviewed and considered in the process of evaluating Alvin Ford under Florida § 922.04, a. memorandum to Governor Bob Graham prepared by Attorney Dick Burr including correspondence of Alvin Ford over a time span of almost two years; b. transcript of testimony of psychiatrist David Taubel, M.D. at the trial of Alvin Ford; c. transcript of an attempted interview between Attorney Laurin Wollan along with paralegals Margaret Vandiver and Gail Rowland with Alvin Ford on December 15, 1983; d. psychiatric report of Jamal Amin, M.D. dated June 9, 1983 to Attorney Richard Burr; e. psychiatric report of Harold Kaufman, M.D. dated December 14, 1983, to Attorney Richard Burr; f. letter from the Office of the Public Defender to psychiatrist Walter Afield, M.D. concerning Alvin Ford, dated December 15, 1983; g. psychiatric report of Peter Ivory, M.D. to Governor Bob Graham re: Alvin Ford, dated December 20, 1983; h. psychiatric report of Umesh Mahtre, M.D. to Governor Bob Graham re: Alvin Ford, dated December 28, 1983; and i. psychiatric report of Walter Afield, M.D. to Governor Bob Graham re: Alvin Ford, dated January 19, 1983.

2. In his testimony at the trial of Ford, Dr. Taubel indicated that he thought Alvin Ford had minimal brain damage with dyslexia and that he had very consistent problems handling numbers and became easily frustrated. He indicated that Ford had been a responsible employee until a short time before his crime and after he had

become frustrated he had quit several jobs and subsequently felt depressed and had suicidal thoughts. Subsequently, he took cocaine and through its stimulus effect did not feel depressed and became involved in several robberies. Later he took out a \$25,000.00 insurance policy but found out that he would have to have a natural death for his mother to collect the money.

3. In the memorandum prepared by Dick Burr for Governor Graham, Attorney Burr documents that Ford was sentenced to death in January 1975 and indicates as documented through a letter dated August 7, 1981, that there was no indication of a thought disorder. Subsequently, Alvin Ford's death warrant was signed in November 1981, and by December 5, 1981, in a letter Ford demonstrated material which I consider to be delusion of receiving messages from a radio staff and of thought broadcasting. In a letter of February 28, 1982, Ford had delusions regarding the Ku Klux Klan and the delusion that Ford could predict what will happen. His thought processes had disorganized with loosening of associations and delusion of a visual hallucinatory experience. He also expressed delusions of grandeur with God writing for him and a report of a visual hallucination. In his letter of April 17, 1982, Ford was preoccupied with the Ku Klux Klan and he was so busy with this preoccupation that he did not have time to read legal material from his attorneys. In the letter dated July 8, 1982, his delusional belief had spread to persecutory beliefs concerning former friends. He was saying that his former friend could cause him to get another murder charge. In his letter dated September 11, 1982, there was indication of delusions of persecution with threats and fear that his life was in danger and the belief that "they" were in the "pipe alley" at the prison. He also had auditory hallucinations hearing a female ask a man not to kill her plus there was indication he had delusions of grandeur, that he had written a book in which the authorship was changed and another person had received \$680,000. He

had paranoid beliefs and delusions concerning his previous friends and he thought they were against him. There was indication he had olfactory hallucinations of decomposing bodies along with a visual hallucination of a gun and a delusion that his family was being murdered. In a letter of September 12, 1982, there was a delusion of his being in contact with President Reagan and in a letter dated October 22, 1982, there was a delusion that his family members had been taken hostage within the prison system. In the December 5, 1982, letter he had delusions that his grandmother was being held in the prison behind his cell as a hostage and in a March 28, 1983, letter he had multiple delusions of various people being hostage within the prison system. He had the belief that he had joined the Ku Klux Klan in order to get his family out of prison and there was indication of loosening of associations. In a letter of April 2, 1983, there was indication of auditory hallucinations of a female along with delusions of persecution and a belief in mindreading and thought broadcasting. He indicated some movement to give his own life in order to protect others. In the letter of April 1983, there was a delusion of grandeur and persecution concerning the hostage situation in the prison. In the letter of May 10, 1983, he still referred to the delusions of the hostages, delusions of grandeur about his own ability to fire officials with the final approval coming from President Reagan. In the letter of May 19, 1983, there was a delusion of grandeur involving national and international persons. In the letter of July 27, 1983, there were delusions of persecution regarding the hostage crisis and delusions of grandeur concerning his own ability to fire and place others under arrest and about marrying Patty Regan with 100 gifts per day being presented 100 days at the White House. In his last letter dated November 28, 1983, to his mother there was indication of delusion of grandeur in that he had aides and 10 wives. There was also indication of thought perversion concerning the word "one".

4. The report of Harold Kaufman, M.D., dated December 14, 1983, indicated that he had conducted an examination of Alvin Ford on November 3, 1983, and for the first 15 minutes Ford ignored him and subsequently Ford's thoughts became incoherent with delusions being expressed. His thoughts were not related and there was indication he had a flat affect. Ford expressed the delusional belief that he was free to go and it would be illegal for the state to execute him and that in turn if they did the executioner would be killed. There were delusions of grandeur that CBS was making a movie about him and the delusions of persecution that there were people in the pipe alley. There were reported auditory hallucinations that Ford could hear the people and delusions of grandeur that he had bought the prison. Ford's thoughts were rambling, disorganized and reflected delusional ideas. Ford indicated his belief to Dr. Kaufman that he, Ford, could not be executed because he had won his case in *Ford v. State* and he expressed the delusional belief that the state did not intend to execute him. Dr. Kaufman's diagnosis was schizophrenia, undifferentiated type, with delusions of disorganized ideas and verbal productions along with a flat affect. Dr. Kaufman expressed the belief that the possibility of Ford's lying or malingering was remote in his opinion. Dr. Kaufman thought that Ford understood the nature of the death penalty but lacked the mental capacity to understand the reasons it was imposed on him. He indicated that Ford believed that he owned the prison and could send mind waves to Governor Graham and President Reagan and through these could control and influence them in their decisions.

The report of Jamal Amin, M.D., dated June 9, 1983, reflected that since December 1981, Ford had become withdrawn, uncooperative, and had shown bizarre behavior. He reflected that Ford steadfastly had refused psychotropic medicines. Dr. Amin listed 12 significant findings concerning the mental status of Ford and these included

that Ford was no longer able to establish rapport as he previously had done, that there was indication of inappropriate affect in moods, that Ford's speech was more symbolic and showed indication of thought blocking, disorganization, and loosening of associations. There was thought insertion of irrelevant material so that Ford could not concentrate on relevant issues. There were delusional beliefs that his thoughts were controlled or influenced by outside sources and he expressed paranoid beliefs concerning the Ku Klux Klan. There was indication of auditory and visual hallucinations with the delusional belief that his mother had been killed in the prison system. Dr. Amin's diagnosis was paranoid schizophrenia with suicidal potential.

In the transcribed record of an attempted interview between Attorney Laurin Wollan, Jr., along with paralegals Margaret Vandiveer and Gail Rowland on December 15, 1983, Ford sat and glowered at them and at times made no responses. Later when he did respond, he was preoccupied with the word "one" and he perseverated on this word and attached it to his irrelevant responses to questions put to him. For example, he said "killed one electric one break one Jesus one Mafia one God one Pope one threaten one leader one claim one stab one". All of his responses reflected a paranoid reference and outlook. He walked out on the interview and essentially people with whom he previously had had a trusting relationship were not able to make significant contact with him.

5. In his report to the Governor Peter Ivory, M.D. indicated that he along with Drs. Afield and Mahtre examined Ford for 35 minutes. Dr. Ivory indicated that later he talked with prison officers, viewed Ford's cell, and talked to a prison psychiatrist. Dr. Ivory did not indicate if he had reviewed any records provided by Attorney Burr concerning Ford. Dr. Ivory indicated that the interview was carried out with great difficulty since Ford responded in a "stylized, manneristic doggerel" and with

nonsensical answers such as he gave answers to questions with responses "beckon one, came one, Alvin one, Q one, king one." It should be noted that his preoccupation and dwelling on the word "one" was the same kind of irrelevant response that he had given to Attorney Wollan on December 15, 1983. Dr. Ivory then noted that it was necessary for him to depend on inferential deduction from nonverbal material to a large extent. It should be noted that if a subject does not have the ability to cooperate verbally with the psychiatrist and if therefore the psychiatrist must rely on nonverbal material, it greatly enhances the opportunity for error and misinterpretation on the part of the examining psychiatrist. Dr. Ivory indicated that by his ability to "read between the lines" of verbal responses which Ford did give that Dr. Ivory was of the opinion that Ford knew exactly what was going on but if one relies on the transcript of the interchange between the psychiatrist and Ford then there is great doubt, at least to this observer, that there was a rational interchange between Ford and the psychiatrist, because Ford gave irrelevant responses to questions put to him although the words he used had some association with the questions asked. Ford's responses do not indicate he had a rational understanding of the process and in fact some of Ford's responses were interpreted by Dr. Ivory to mean Ford maintained the belief that he would be spared by the angel of death and this delusional belief is in keeping with other delusional beliefs that Ford manifested to others in his correspondence. Dr. Ivory expressed his belief that because Ford had a clean and organized cell that this indicated to him that Ford could not have a disorganized mind or thought system in that insanity was not selective but pervasive. To this reviewer, it appears that Dr. Ivory is of the opinion that there is a significant correlation between disorganization of internal thoughts and the way that one keeps a room. From my understanding of the literature it is apparent that one can be highly disorganized internally and yet

keep a clean room as well as one can be highly disorganized in the way he keeps his room and yet be very organized and productive in his thought processes. Dr. Ivory gives his belief that Ford shows a "severe adaptational disorder". This diagnostic opinion does not reflect a diagnosis from D. S. M. III. Dr. Ivory expresses the belief that Ford's disorder although severe "seems contrived and recently learned". Although Dr. Ivory did not comment on whether or not he had reviewed materials provided by Attorney Richard Burr, he at least was given the materials and these materials, in my opinion, document severe though disturbance with delusions as early as December 5, 1981, so there is nothing recent about the disorder and if they are contrived, Ford has expressed this delusional belief system to a number of different parties in a consistent manner and has not done so just for examining psychiatrists.

6. The report of Dr. Umesh Mahtre indicated that most of Ford's responses to questions were bizarre and were gibberish talk but that Ford maintained good eye contact. Mahtre found Ford to have a blunted affect. There is no clear indication of exactly what the three examiners did in the way of a mental status examination but Dr. Mahtre indicated that doctors relied on prison guards who said that Ford's gibberish talk and bizarre behavior started after all legal attempts had failed yet as previously mentioned there is documentation that Ford's thought processes reflected a disturbance with delusional ideas as early as December 5, 1981, shortly after his death warrant was signed in November 1981. Dr. Mahtre said the guards indicated that Ford had become more depressed after Sullivan had been executed. Dr. Mahtre gave his diagnostic opinion that he felt Ford showed "psychosis with paranoia". By definition, if a person has a psychosis there is a break with reality. Dr. Mahtre indicated that Ford "appears" to understand what is happening around him but Dr. Mahtre did not give the

basis for this inferential statement. Dr. Mahtre presents no documentation for his opinion as to why he believes Ford understands the nature and effects of the death penalty and why it is imposed if Ford is psychotic. Dr. Mahtre recommended that Ford receive anti-psychotic medicine but did not mention whether or not he was aware of the fact that Ford consistently refused to take anti-psychotic medicine. Dr. Mahtre did not say if he believed that Ford was incompetent to refuse medicine and, therefore, it could be given to him against his will.

7. In his report dated January 19, 1984, Dr. Walter Afield stated that his examination consisted of a complete mental status examination yet he did not document what his examination consisted of. In his report Dr. Mahtre had said that orientation and memory of Ford were not tested so it is not readily apparent exactly what Dr. Afield considers to be necessary in a "complete" mental status examination. Dr. Afield said that in his opinion Ford does not present a classical description of a psychiatric illness so he makes no official diagnosis other than to say that in his opinion he believes Ford to be psychotic and to be severely disturbed. In spite of Dr. Afield's believing that Ford was psychotic, Dr. Afield went on to express the conclusionary statement that he felt Ford did understand the nature of the death penalty and that he may be executed but he presents no documentation of data on which he reaches this conclusionary belief.

8. In his letter to the three examining psychiatrists dated December 15, 1983, Attorney Richard Burr clearly documented that Ford had the delusional belief that he had won his case in *Ford v. State* and had deprived the State of lawful authority to execute him. Attorney Burr went on to outline for the psychiatrists how he believed Ford had deteriorated across time with the development of delusional beliefs as early as February 1982. These delusional beliefs were persecutory and grandiose in nature. Later in November 1982, Ford began refusing to see his

attorneys. Furthermore, Attorney Burr expressed his belief that Ford had continued to be paranoid and suspicious of others. He said to the psychiatrists that Ford sometimes refused to talk and predicted that this may happen in their examination and encouraged them if it did to be patient with Ford and persist so that once he opened up to them his pathological thought processes would become readily apparent. In spite of this precautionary note and encouragement by Attorney Burr for the psychiatrists to be patient and take time with Ford, the psychiatrists spent 35 minutes in their examination of him. None of the three psychiatrists appointed by the Governor commented on or made note of the evidence pointing toward Ford's delusional belief system over a period of about two years. None of them dealt with Ford's delusion that he had won his case and could not be executed.

9. The materials which I reviewed give evidence of documenting symptoms in Ford which are consistent of the diagnosis of schizophrenia, paranoid type. These symptoms include delusions of persecution, delusions of grandeur, thought blocking, thought insertion, thought broadcasting, flat affect, loosening of associations and disturbance of speech with word gibberish. In the psychiatric interview conducted by the three examiners appointed by the Governor, Ford was uncooperative and he gave them few meaningful verbal responses so that they relied heavily on his nonverbal productions and their ability to read between the lines for what he might be meaning with his nonsensical replies to their questions. In my opinion, the three examiners give conclusionary opinions about Ford's competency to be executed without documenting in a satisfactory manner their evidence or facts upon which their inferences are based. As a result, in my opinion, the factfinder and, in this case, Governor Graham and/or the Court is left with the dilemma of depending on conclusionary belief statements by the psychiatrists that Ford is competent to be executed without

adequate documentation by the psychiatrists so that the factfinder must rely on the credentials of the psychiatrists rather than their data. In my opinion, this leaves the factfinder in a very unsatisfactory position when a man's life is at stake and in the absence of additional checks and balances is not in keeping with my understanding of due process.

/s/ George W. Barnard
GEORGE W. BARNARD, M.D.

[Closing Jurat Omitted in Printing]

[Curriculum Vitae of Dr. Barnard Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

**RESPONSE TO PETITION FOR
WRIT OF HABEAS CORPUS**

Respondent, Louie L. Wainwright, as Secretary of the Florida Department of Corrections, hereby responds in opposition to the instant petition for writ of habeas corpus as follows:

INTRODUCTION

This pleading is being filed in conjunction with respondent's response in opposition to petitioner's application for a stay of execution. Both pleadings are being drafted on an anticipatory basis; that is, due to the abbreviated time schedule, respondent has not yet received any of petitioner's pleadings. Therefore, both responses have been drafted based upon what counsel anticipate will be raised in the pleadings to be filed by petitioner.

I

**COURSE OF PRIOR PROCEEDINGS
AND BASIS OF DETENTION**

On July 26, 1974, petitioner was charged by indictment with the first-degree murder of police officer Dimitri Walker Ilynkoff during the course of an attempted robbery. On December 17, 1974, petitioner was convicted of murder in the first degree and, following a jury recommendation of the death penalty, petitioner was sentenced to death on January 6, 1975.

The judgment and sentence were affirmed by the Florida Supreme Court. *Ford v. State*, 374 So.2d 496 (Fla. 1979), and the United States Supreme Court denied certiorari. *Ford v. Florida*, 445 U.S. 972 (1980).

Petitioner was one of one hundred twenty-three death row inmates who filed a petition for writ of habeas corpus in the Florida Supreme Court, challenging that court's alleged practice of receiving non-record material in connection with its review of capital cases. The supreme court dismissed that petition, *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981).

A death warrant was signed by the Governor of Florida requiring that petitioner be executed by December 11, 1981, the execution itself having been scheduled for December 8, 1981. Petitioner thereafter filed a motion for post-conviction relief pursuant to *Fla.R.Crim.P.* 3.850 in the state trial court, which motion was eventually denied after an evidentiary hearing held on the issue of the alleged ineffective assistance of trial counsel, and petitioner's application for a stay of execution in conjunction with that proceeding was also denied. Petitioner thereafter appealed the denial of his motion for post-conviction relief to the Florida Supreme Court, and filed an original petition for a writ of habeas corpus in that court alleging that his counsel on direct appeal had been ineffective. Those two matters were consolidated, and shortly thereafter the Florida Supreme Court affirmed the denial of the motion for post-conviction relief, denied the petition for a writ of habeas corpus, and denied petitioner's request for a stay of execution. *Ford v. State*, 407 So.2d 907 (Fla. 1981).

Petitioner filed his first petition for a writ of habeas corpus in this court on December 3, 1981, and after hearings held on December 4, 6 and 7, 1981, this court denied all relief, including petitioner's request for a stay of execution, in a written order detailing the court's findings of fact and conclusions of law. However, that evening a stay was entered by the United States Court of Appeals for the Eleventh Circuit. The appellate court granted respondent's request for an expedition of the appeal, and initially a divided panel of that court affirmed this court's rulings. *Ford v. Strickland*, 676 F.2d 434 (11th Cir.

1982). Rehearing on *en banc* was granted, oral argument was entertained before the court *en banc*, and eventually a lengthy opinion was filed which again affirmed this court's rulings. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1982). Certiorari was thereafter denied by the United States Supreme Court. *Ford v. Strickland*, — U.S. —, 104 S.Ct. 201 (1983).

On April 30, 1984, the Governor of Florida signed a second death warrant in petitioner's case; the warrant will expire on June 1, 1984 at 12:00 noon, and the execution itself is presently scheduled for Thursday, May 31, 1984 at 7:00 a.m. On Monday, May 21, 1984, petitioner filed a motion for hearing and appointment of experts for determination of competency to be executed and a motion for a stay of execution in the state trial court (Exhibit A). His motions were denied by the state trial judge on that same day (Exhibit B). Thereafter, petitioner applied for the same relief to the Florida Supreme Court (Exhibit E), and also filed an original petition for writ of habeas corpus in the Florida Supreme Court alleging that the jury had been erroneously instructed during the penalty phase of his trial (Exhibit C). Responsive pleadings were filed (Exhibits D and F), and oral argument was heard by the Supreme Court on May 25, 1984. On that same date the Florida Supreme Court denied the application for appointment of experts, denied the petition for writ of habeas corpus, and denied the application for a stay of execution (Exhibit G).

This proceeding follows.

APPLICABILITY OF RULE 9(b)

Rule 9(b) of the Rules governing Section 2254 Cases in the United States District Courts 28 U.S.C. § 2254 (1977) provides as follows:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Respondent submits that it is the latter section of Rule 9(b) that applies to Petitioner's claims, and that this petition should be dismissed as an abuse of the writ. See *Potts v. Zant*, 638 F. 2d 727, 740 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981).

Where new grounds are raised in a second or successive petition the burden is on the government to specifically allege that the Petitioner is abusing the writ by having omitted these grounds in his earlier petition. *Price v. Johnston*, 334 U.S. 266, 292 (1948). As the Fifth Circuit Court of Appeals recently explained in *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983) (en banc), the initial pleading burden is met if the government "notes Petitioner's prior writ history, indicates the claims appearing for the first time in the successive petition, and affirms its belief that Petitioner is abusing the writ in a matter proscribed by Rule 9(b)." Once the government has met its burden of pleading abuse of the writ, the Petitioner has the "burden of answering the allegation and of proving by a preponderance of the evidence that he has not abused the writ," *Jones v. Estelle*, supra, 722 F. 2d at 164 quoting *Price v. Johnston*, supra 334 U.S. at 292 (emphasis original).

The court in *Jones* further explained that the governing principles

boil down to the idea that a petitioner can excuse his omission of a claim from an earlier writ if he proves he did not know of the "new" claims when the earlier writ was filed. The inquiry is easily answered when the claim has been made possible by a change in the law since the last writ or a development in facts which was not reasonably knowable before. 722 F. 2d at 165.

As the court noted, the objective of the procedural rules is to

preserve the proper use of the writ of habeas corpus to win review of unlawful action, while recognizing that 'the advancing of grounds for habeas corpus relief in a one-at-a-time fashion when the evidence is available which would allow all grounds to be heard and disposed of in one proceeding, is an intolerable abuse of the Great Writ.' *Id.* at 164-165 (citations omitted).

The principles of law enunciated in *Jones* are highly significant to the instant petition, because the Fifth Circuit held that abuse of the writ may properly be found where a Petitioner was represented by competent counsel in a prior federal habeas corpus proceeding; where, as in the instant case, the Petitioner was not proceeding *pro se* in the first federal habeas case, a Rule 9(b) bar is not limited to those claims that the Petitioner himself deliberately and knowingly withheld. Rather,

the inquiry into excuse for omitting a claim from an earlier writ will differ depending upon whether Petitioner was represented by counsel in the earlier writ prosecution. Representation by competent counsel has an immediate impact upon the quality of proof necessary to prove an excuse for omitting a prior claim. With counsel the inquiry is not solely the awareness of a Petitioner, a layman, but must include that of his competent counsel. *When a Peti-*

tioner was represented by competent counsel in a fully prosecuted writ he cannot by testimony of his personal ignorance justify the omission of claims when awareness of those claims is chargeable to his competent counsel. 722 F. 2d at 167.

Another factor which must be considered by this Court in determining whether there has been an abuse of the writ is the timing of the presentation of the claim. *Autry v. Estelle*, 719 F. 2d 1247, 1250 (5th Cir. 1983). As Justice Powell stated in *Woodward v. Hutchins*, — U.S. —, 104 S. Ct. 752, 78 L. Ed. 2d 541, 543 (1984) "this is another capital case in which a last minute application for a stay of execution and a new petition for writ of habeas corpus relief having been filed with *no explanation as to why the claims were not raised earlier* or why they were not all raised in one petition. It is another example of abuse of the writ."

In the instant case, the Petitioner filed his first petition for writ of habeas corpus in this Court on December 2, 1981. *Ford v. Wainwright*, Case No. 81-6663-CIV-NCR. On December 7, 1981, this court orally denied the petition, and after a stay of execution was granted by the Eleventh Circuit on that same day, this Court on December 10, 1981, entered its written order denying the petition. In the first petition, Petitioner did not raise any of the issues which he now raises in the present petition. However, it must be noted that in the evidentiary hearing on December 7, 1981, before this Court, the Petitioner presented the testimony of Dr. Jamal Amin, one of the psychiatrists upon whose opinion he relies on to prove that Petitioner is not incompetent to be executed.

As this Court may recall, the gist of Dr. Amin's testimony was that trial counsel was ineffective for having called Dr. Taubel to testify during the sentencing phase because Dr. Taubel, a white psychiatrist did not have sufficient socio-cultural compatibility with the Petitioner to properly present the psychiatric testimony. However,

Dr. Amin did testify that from his interview with the Petitioner in the latter part of July, or first part of August, 1981, that he would classify the Petitioner as having an extreme mental and emotional disturbance which contributed to his actions at the time of the murder (H.C.T. 98),¹ and that in his opinion the Petitioner was acting under a 'violent dissociative reaction whereby someone can in the course of a violent incident be completely out of control and in a psychotic state.' (H.C.T. 105).

After this Court denied the first petition for writ of habeas corpus, the Petitioner appealed to the Eleventh Circuit, en banc, in which the dismissal of the petition was affirmed, *Ford v. Strickland*, 696 F. 2d 804 (11th Cir. 1983) (en banc), and after denial of certiorari by the United States Supreme Court, *Ford v. Strickland*, — U.S. —, 104 S. Ct. 201 (1983), the cause was remanded to this Court for consideration of the effect of *Barclay v. Florida*, — U.S. —, 103 S. Ct. 3418 (1983) on the issue of whether the trial judge's erroneous reliance upon certain aggravating circumstances was properly determined by the Florida Supreme Court to be harmless error. The mandate from the Eleventh Circuit was issued on October 6, 1983. From that date until March 22, 1984, this Court had jurisdiction to consider any additional claims which were ripe for federal habeas review.² See, e.g., *Arango v. Wainwright*, 716 F.2d 1353 (11th Cir. 1983) (motion for rehearing pending).

Petitioner has alleged in this petition that his current mental problems began around December 5, 1981, and he has consistently deteriorated through December 19, 1983, when Petitioner was examined by the three psychiatrists

¹ "H.C.T." refers to transcript of habeas corpus hearing before this Court on December 7, 1981.

² On March 22, 1984, after finding that the resolution of *Barclay v. Florida*, *supra*, was in accordance with the Eleventh Circuit's affirmance of this Court's decision in the first petition, this Court dismissed the petition.

appointed by Governor Graham pursuant to Executive Order 83-197. Yet despite all the letters and other communication by the Petitioner to counsel, and the reports of Dr. Amin and Dr. Kaufman, counsel did not see fit to challenge Petitioner's competency through the state or federal courts until May 21, 1984, ten days before his scheduled execution. The Respondent submits that Petitioner could have brought the substantive due process and eighth amendment claims on the issue of insanity *vel non* barring execution, prior to the governor's implementation of the statutory procedures of Section 922.07, *Florida Statutes*. An issue as to post-conviction insanity becomes ripe for determination upon the state court sentence of death. *See generally Goode v. Wainwright*, — F. 2d —, Eleventh Circuit, Case No. 84-3224, slip opinion filed April 4, 1984. Furthermore, the showing of changed conditions does not mean that post-conviction insanity can be held back as an issue until the eve of execution and then raised for the first time. *Goode v. Wainwright*, *supra*, slip opinion at 4.

Respondent submits that as in *Goode v. Wainwright*, *supra*, Petitioner is barred from raising the issue of the constitutionality of the procedures in Section 922.07, because of abuse of the writ. In his first federal habeas corpus petition, Petitioner contended that trial counsel was incompetent for having Dr. Taubel testify. In support of this allegation, Petitioner presented the testimony of Dr. Amin, who stated that Petitioner suffered from an extreme mental and emotional disturbance, such as to be in a psychotic state at the time of the murder. This Court rejected the contention as to ineffective assistance of counsel. Petitioner's mental state, as in *Goode*, has been an issue known to Petitioner for the past two and one half years. Yet, now, Petitioner claims that there is new evidence that Petitioner has become incompetent. This claim must be rejected.

In *Hutchins v. Woodward*, *supra*, the Supreme Court rejected a "new claim" that there was *new* evidence that Hutchins was insane, stating:

A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus. 78 L. Ed. 2d at 544-545.

Thus, Respondent submits that because Petitioner's mental state has been an issue since 1981, the issue raised herein regarding the alleged unconstitutionality of the procedures to determine Petitioner's alleged incompetency to be executed should be deemed an abuse of the writ.

• • • •

DETERMINATION OF SANITY TO BE EXECUTED AND THE SCOPE OF FLA.STAT. 922.07

The contention of petitioner that, separate and apart from the procedure outlined in § 922.07 *Fla.Stat.* there is a common law right to a determination of a prisoner's competency to be executed, which as a corollary entitles him to certain due process guarantees, is erroneous. It is true that the early state judicial decisions recognized such right, and provided that application for a determination of sanity to be executed should be addressed to the trial court, "there being no statute covering the subject." *Ex Parte Chessser*, 93 Fla. 291, 111 So. 720, 721 (1927); *State ex rel Debb v. Fabisinski*, 111 Fla. 454, 152 So. 207, 211 (1933). In *Hysler v. State*, 136 Fla. 563, 187 So. 261 (1939), the court reaffirmed *ExParte Chessser*, *supra*, and again held that on the question of sanity to be executed, application should be made to the trial court for a determination.

Following the decision in *Hysler*, the legislature enacted what is now § 922.07, *Fla.Stat.*, which sets forth the proceedings to be followed by the Governor when a person under sentence of death appears to be insane.

It is an accepted rule of statutory construction that the legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute. *Mains Ins. Co. v. Wiggins*, 349 So.2d 638, 642 (1 DCA Fla. 1977), *Bermudez v. Fla. Power and Light Co.*, 433 So.2d 565, 567 (3 DCA Fla. 1983). Aware that previously applications for determinations of sanity to be executed were to be made to the trial court, the legislature enacted a statute which decreed this function would be henceforth fulfilled by the Governor. This statute is now the controlling law within its sphere of operation. *DeGeorge v. State*, 358 So.2d 217, 220 (4th DCA Fla. 1978). The Governor's authority to determine sanity, with the aid of an appointed commission of three psychiatrists as outlined in § 922.07, is entirely appropriate. *Solesbee v. Balkcom*, 339 U.S. 9 (1950). Thus Florida has accepted the legal proposition that an insane person cannot be executed and has provided through § 922.07, the means to invoke it.

In *Goode v. Wainwright*, — So.2d — No. 65,098 (Op. filed 4-2-84), the Florida Supreme Court addressed the issue, agreed "that an insane person cannot be executed," (slip op. at 3), and held that § 922.07 sets forth "the procedure to be followed when a person under sentence of death appears to be insane. The execution of capital punishment is an executive function and the legislature was authorized to prescribe the procedure to be followed by the Governor in the event someone claims to be insane." Thus in *Goode* the Court held under § 922.07 the Governor can make the determination; *Goode* does not stand for the proposition that the issue of sanity to be executed can be raised independently in the state judicial system.

The petitioner argues that execution of an insane person would violate the Eighth Amendment. Assuming *arguendo*, without addressing the merits, that this is true, there is no need for this court to decide the issue because Florida law does not provide for executing insane per-

sons. Moreover, the petitioner's assertion of insanity has already been resolved against him by the Governor.

The fact that the determination of sanity to be executed is, pursuant to Florida law, made by the Governor, is in accord with controlling precedent of the United States Supreme Court. In *Nobles v. Georgia*, 168 U.S. 515 (1897) the court held the question of insanity after verdict did not give rise to an absolute right to have the issue tried before a judge and jury, but was addressed to the discretion of the judge. The court concluded the manner in which the sanity question was to be determined was purely a matter of legislative regulations. Subsequently, in *Solesbee v. Balkcom*, 339 U.S. 9 (1950), the court noted it was unnecessary to decide if execution of an insane person is "cruel and unusual punishment" because Georgia did not approve the practice of executing insane persons, and it held the Georgia procedure whereby the Governor determined the sanity of an already convicted defendant did not offend due process:

We are unable to say that it offends due process for a state to deem its Governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.

. . . .

To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn respon-

sibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved.

Finally, in *Caritativo v. California*, 357 U.S. 549 (1958), the court affirmed on the authority of *Solesbee v. Balkcom*, *supra*. In his concurring opinion, Justice Harlan approved the California procedure whereby the prison warden was given the initial responsibility to preliminarily determine a condemned prisoner's sanity, *ex parte*, as not violative of due process.

It is apparent from these decisions that in the post-conviction post-sentencing stage of a capital proceeding, the determination of a prisoner's sanity may be made by the Governor as provided by § 922.07. The petitioner's argument that *Solesbee* and the other decisions are no longer good law is not supported by the cases he cites: *McGautha v. California*, 402 U.S. 183 (1971); *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gardner v. Florida*, 430 U.S. 349 (1977); for these cases do not affect the validity of *Solesbee*'s holding that sanity for execution can be determined by the Executive.¹ The continued validity of *Solesbee* was recognized in *Goode v. Wainwright*, — So.2d —, No. 65,098 (Op. filed 4-2-84) where it was cited at length (slip. op. at 4-5), and in *Goode v. Wainwright*, — F.2d — (11th Cir. 1984) No. 84-3224, Op. filed 4-4-84 (slip op. at 2-3), where it was held the statute meets minimum due process standards.

The petitioner asserts the sanity test for execution should be the same as for competency at the time of trial. The respondent maintains the standard set forth in § 922.07(1), *Fla.Stat.*, which is whether the condemned

¹ None of these cases have held that execution *per se* violates the Eighth Amendment; the procedure of how the death penalty is imposed has been the issue, and it has been decided in the context of the Eighth Amendment as applied to the states through the Fourteenth. Therefore, the resolution of *Solesbee* on due process grounds satisfies the petitioner's Eighth Amendment argument.

man "understands the nature and effect of the death penalty and why it is to be imposed upon him," is sufficient. The third prong suggested by petitioner, that the prisoner possesses sufficient understanding to be aware of any facts that may make his punishment unjust and have the ability to convey such information to his counsel is taken from the competency to stand trial standard set forth in *Dusky v. United States*, 362 U.S. 402 (1960), i.e. "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rationale understanding." In the present posture of this case—post conviction, post sentence, post appeal, post collateral attack—this suggested standard is inappropriate. The petitioner has already had full access to the state and federal courts. See, *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980); *Ford v. State*, 407 So.2d 907 (Fla. 1981); *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (en banc); *cert. denied*, — U.S. —, 78 L.Ed.2d 176 (1983). He has not been deprived of the opportunity to litigate any and all issues arising from his 1974 trial.

The present allegation that the petitioner's competency must be evaluated in terms of whether he is able to supply new information which would warrant still more litigation is absurd in view of the history of this case. Like Arthur Goode, the petitioner *sub judice* "has exercised his right to use the full processes of the judicial system." *Goode v. Wainwright*, — So.2d —, No. 65,098 (Op. filed 4-2-84) (slip op at 3). The competency standard for purposes of determining sanity to be executed set forth in § 922.07(1), *Fla.Stat.*, is legally and constitutionally sufficient.²

² In *Gray v. Lucas*, 710 F.2d 1048, 1054 (5th Cir. 1983), the court merely noted "both parties in the present case are content to rest on this test." It did not decide that the prisoner's ability to know facts which would make the punishment unjust and to communicate them to his attorney was a requisite element of the determination of sanity to be executed.

The petitioner's argument that he is entitled to the same procedural protections that are applicable to a claim of incompetency to stand trial was rejected by the Florida Supreme Court in *Goode v. Wainwright*, — So.2d —, (Fla. 1984), No. 65,098 (Op filed 4-2-84). The same basic contention was raised in *Goode*, and the court determined therein that "The Governor has the inherent right to grant a stay of execution and to make a determination as to the sanity of an individual who has been sentenced to death. We find no abuse of authority, nor do we find any denial of due process." (slip op at 5).

As respondent has discussed, § 922.07 *Fla.Stat.* by its terms outlines the "proceedings when [a] person under sentence of death appears to be insane," and it provides the exclusive means by which the sanity of a condemned prisoner is to be determined. It does not coexist with any separate right to a judicial determination.³ The statute, which delegates the function of determining sanity in these circumstances to the Governor, is akin to the clemency power which likewise reposes exclusively in the Chief executive. *Sullivan v. Askew*, 348 So.2d 312 (Fla. 1977); *Spinkellink v. Wainwright*, 578 F.2d 582, 617-19 (5th Cir. 1978). Since in *Goode* the Florida Supreme Court held the statute comports with due process and the Eleventh Circuit agreed, *Goode v. Wainwright*, — F.2d —, (11th Cir. 1984) No. 84-3224 (op filed 2-4-84) that ends the matter.

The Governor's determination that the petitioner is competent to be executed is supported by the reports of the psychiatrists who examined the petitioner. Dr. Ivory reported:

I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to

³ That portion of the Eleventh Circuit's *Goode* decision, cited *in/ra*, which appears to permit judicial litigation of mental competency is mere *dicta*, as that issue was not squarely before the court. The court's opinion was grounded on a finding that *Goode* has abused the writ.

external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior he showed that he is in touch with reality . . . This inmate's disorder, although severe, seems contrived and recently learned. My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty.

Dr. Mhatre reported:

The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized. . .

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to under-

stand the nature and the effects of the death penalty, and why it is to be imposed upon him.

Dr. Afield's opinion is:

. . . Although this man is severely disturbed, he does understand the nature of the death penalty that he is facing, and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him.

The petitioner's assertion of insanity, based on Dr. Kaufman's report, presents nothing more than an issue of fact which has already been resolved against him by the Governor of Florida following the statutorily prescribed fact finding procedure which entailed an examination of the petitioner by three psychiatrists, as discussed above. That factual determination is non-reviewable in a federal habeas corpus proceeding. *Solesbee v. Balcom*, *supra*; *Sumner v. Mata*, 449 U.S. 539 (1981); *Goode v. Wainwright*, USDC No. 84-68-Civ-F&M-10 (M.D. Order entered 4-4-84).

CONCLUSION

THEREFORE, respondent respectfully requests that the instant petition for writ of habeas corpus and related motions be denied.

Respectfully submitted,

[Counsel for Respondent]

[Names/Addresses of Counsel
Omitted in Printing]

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

TRANSCRIPT OF HEARING BEFORE
THE HONORABLE NORMAN C. ROETTGER, JR.

* * * * *

[3] MR. BURR: Your Honor, I would like to address, first of all, the competency issue and the facts of competency and the abuse of the writ question related to competency because those two go hand in hand; and certainly abuse of the writ is a special issue that we have to get over before there is anything else to talk about with respect to the competency issue. So I will limit my opening [4] remarks to what we submit is the right of Alvin Bernard Ford not to be executed when he is incompetent.

THE COURT: Well why are we arguing about that? Isn't the law fairly settled that executions don't take place if someone is incompetent?

MR. BURR: We submit that it is.

THE COURT: Why don't you address yourself to something that might be in issue?

MR. BURR: Well I think abuse of the writ is in issue. It certainly is an issue that the State has raised.

THE COURT: So you are addressing the question not on whether or not an incompetent person can be executed but whether or not there's abuse of this writ.

MR. BURR: That is correct.

THE COURT: Very well.

Please proceed.

MR. BURR: As I said the facts of competency and the question of abuse are intertwined.

The most important thing to note about abuse of the writ from our perspective and I think from the Court's perspective is that Alvin Ford did not become incompetent in the estimate of Counsel and observers of Mr. Ford until October of 1983—

THE COURT: Hasn't the State contended differently?

MR. BURR: The State does contend differently and [5] to the extent that it rests on a different interpretation of facts I think the facts would have to be resolved in a hearing; but I don't think that the facts which genuinely go to any issue arose are in dispute because I don't think the State has been able to put them in dispute.

THE COURT: Well that psychiatrist testified before me nearly three years ago.

MR. BURR: That's right; but he said nothing about competency. His testimony was solely related to whether at the time of the incident Mr. Ford was laboring under any extreme mental or emotional disturbance, and he postulated that he was. At that point in time we made no claim about his current competency. There was no claim made about his competency at trial. There was no claim ever made about Alvin Ford's competency.

THE COURT: No. But could you have.

MR. BURR: In my estimation—

THE COURT: In December of 1981 when I had a hearing in this matter, evidentiary hearing.

MR. BURR: Absolutely not. I had no reason on earth to believe Alvin Ford was incompetent. He could speak with me about the issues in the case and explained what went on in the incident without any degree of difficulty at all.

THE COURT: But you were not his Counsel then, were you?

[6] MR. BURR: I became his Counsel in the course of that proceeding and had the opportunity while he was in Fort Lauderdale for that proceeding to spend a good deal of time with him. There was no question in my mind of competency.

THE COURT: Wait a minute. Let's go into that a little bit.

You became his Counsel during the course of that proceeding?

MR. BURR: I appeared with Mr. Wollan from Tallahassee.

The Friday evening when we first appeared before Your Honor, Mr. Wollan was the only Counsel and at that point shortly after the proceeding started that Friday night, Your Honor admitted me to assist in representation of Mr. Ford.

THE COURT: When did your co-Counsel leave?

MR. BURR: He is still co-Counsel.

THE COURT: He's not here.

MR. BURR: He's not here. Since that day, since that time, my circumstances have changed. I have become a member of the Public Defender's Office for this State Judicial Circuit and that office has taken over the representation of Mr. Ford along with Mr. Wollan.

THE COURT: Very well.

Please proceed.

MR. BURR: From December of 1981 on, there began [7] to be some deterioration of Mr. Ford. The deterioration was hardly noticeable at first. In late December, early January, he began talking about his ability to communicate with the staff of the radio station in Jacksonville. Seemed quirky but who knew what that meant. Sometime later, in late February of 1982, Mr. Ford began what became a genuine obsession with the Ku Klux Klan. Mr. Ford became convinced that in late February '82, that a Ku Klux Klan had burned a house in Jacksonville where a black family had been killed and he attempted to communicate that message to a number of people through letters. He says that he talked with the staff of the radio station about his insight. He wrote one very, very long letter, which is in habeas petition, explaining how he got the insight about the Ku Klux Klan's role in that arson.

Again, we knew about that. We got copies of the letters that he wrote. But there was at that point nothing to suggest that whatever was happening with Mr. Ford was intertwined with his understanding of his case.

He continued. Several months later in 1982 he began to think that the Ku Klux Klan had members serving as correctional officers at Florida State Prison. He thought that these officers were put there to harass him and to make him commit suicide. He believed that these officers were holding people hostage and there is what he calls a [8] "pipe alley" a tunnel behind his cell at Florida State Prison where he thought hostages were being held. He describes in his letters the torture of the hostages and torture of himself emotionally again by what was going on. Again, strange stuff. Certainly an indication that he might be becoming psychotic. But when we visited with Mr. Ford he was able to talk with us about his case, he had an understanding where the case was in the Courts and he seemed to be becoming more concerned about what he called the hostage crisis than about anything else. But we were still able to communicate with him.

That proceeded through 1982 pretty much in that fashion with the delusions growing in scope and with more people being brought into the delusions; the number of hostages that he thought were being held increased. He began writing more impassioned letters to people that he thought had the power to help him.

THE COURT: What did you do about that?

MR. BURR: Well we talked, we tried to see Mr. Ford as often as we could, and we engaged the services of—

THE COURT: "We"? "We"?

MR. BURR: "We," meaning Counsel for Mr. Ford.

At that point in the fall of 1982 I was in West Palm Beach and my colleagues in the Public Defender's Office and I attempted to counsel with Mr. Ford. We also obtained [9] the services of a psychiatrist, Doctor Jamal Amin who testified before, has been seeing Mr. Ford all along and was able to see Mr. Ford through about August of 1982 and at that point Mr. Ford began to think that Doctor Amin was one of his persecutors, began to think that he was in conspiracy with the Ku Klux Klan to hold

hostages and drive him crazy so he refused to see Doctor Amin in about August of '82. Doctor Amin continued consulting with us to help us in our dealings with Mr. Ford to try to bring some sense of reality to him. But by January of 1983 it was clear that we needed another psychiatrist to try to get in to see Mr. Ford.

At that point we asked for the assistance of a psychiatrist from Washington D.C. named Harold Kaufman, and from that point through the present Doctor Kaufman has consulted with us and has seen Mr. Ford on a couple of occasions. He has also reviewed hours of taped interviews with Mr. Ford.

THE COURT: Why would you go to Washington D.C. for a psychiatrist?

MR. BURR: Well, we were looking—

THE COURT: Is he one who was going to say what you wanted him to say?

MR. BURR: We had no reason to know what he would say.

THE COURT: I mean some psychiatrists have that [10] reputation both ways.

MR. BURR: Why sure. I did not know anything about Doctor Kaufman's reputation except that he was, had been for a number of years a consultant with the D.C. Court of Appeals, the D.C. Circuit Court of Appeals on psychiatric issues. He was also himself a lawyer and in our situation that was important because in late 1982 Mr. Ford began to suggest that he wanted to drop his appeals in his case. We at that point thought that he might be not competent to make an intelligent choice about dropping his appeals and that in fact had reason to believe that he had reason to do that as a way of ending the hostage crisis. So we got Doctor Kaufman's assistance for that reason initially. We knew we might be in a position of questioning Mr. Ford's ability to drop his appeals because he was making, he was saying those things at that point. So we turned to a psychiatrist who knew forensic psychiatry and the law and in our situa-

tion we thought that would be very helpful and he came well recommended by virtue of his consultation with the D.C. Circuit.

Through 1983 Mr. Ford's delusional system continued to change somewhat. The hostage crisis theme was still there but he began to develop other delusions as well and I believe in about April of 1983 or May Mr. Ford indicated that he had joined the Ku Klux Klan and not too [11] long after that he started writing in his letters that he was ending the hostage crisis, that he himself had brought a number of the perpetrators into the Courts, had appointed new justices of the Florida Supreme Court and there was a sentence that within his delusional world he had gained some resolution of what he had called the hostage crisis. Even at that point at the times that Mr. Ford would come out to visit, and he frequently would not come out to see us when we went to see him at the prison, we had no reason to believe that he thought that he couldn't be executed or that he had no understanding of why he was on Death Row; and for us that was the critical factor that we were looking at. We were at a point in his case where consultation with him about the issues in his case was not necessary because the issues were proceeding through the Courts in a fairly regular manner and there were legal decisions to be made but the choice of issues to litigate had been made long before.

THE COURT: Why would you just watch all this as you have described then, and do nothing?

MR. BURR: Your Honor, we did not do nothing. We retained the services of psychiatrists—

THE COURT: Why didn't you file something in the Courts?

MR. BURR: I didn't—I had no reason to file anything because I had no reason to think there was a legal [12] claim related to his state. This was—

THE COURT: Why?

MR. BURR: Pardon me?

THE COURT: Why would they tell us he was fine and dandy?

MR. BURR: No. Both Doctor Amin—

THE COURT: What were they telling you then?

MR. BURR: Doctor Amin and Doctor Kaufman were saying to us they thought Mr. Ford was psychotic but his psychosis at that point focused on nothing to do with this case, had nothing to do with his ability as far as he could tell to understand his case. He seemed in our conversations with him to be aware that he was on Death Row in Florida for the murder of Dimitri Walter Ilyankoff and that he was under sentence of death and at that point in time that much orientation to reality was all that the law required. We had no basis for a claim.

I have to stress that our contact with Mr. Ford, though we attempted to have a good deal of contact, was not as frequent as we would have liked. We went to the prison to see him quite often and he would not come out and the prison's policy is not to bring somebody out that doesn't want to see their lawyer. We questioned a good deal of the prison staff about whether he was being treated. The prison's medical staff took the position that there was [13] nothing wrong with Mr. Ford. So we were caught in a position of not being able to get him any treatment for what our psychiatrists thought was a serious illness because the prison wouldn't treat him. We were in a position—

THE COURT: But you didn't file any suit to compel this?

MR. BURR: I did not file a right to treatment suit, no.

THE COURT: How come?

MR. BURR: At that point—

THE COURT: You think you just wait until you lose all the appeals and you got in a situation like this, then you would bring it up?

MR. BURR: No, Your Honor. I had no reason to believe at this point that his illness would invade his ability to understand his sentence of death and why he got it. I had absolutely no reason to believe that. Certainly looking back on it I can see that that would have been something to look for and in fact, we did look for.

The first indication, the very first indication that we had that Mr. Ford's illness crept into his ability to understand his sentence of death was in October of 1983. In about the middle of October Mr. Ford came out to see a minister from Nashville who had been corresponding with him for a number of years and had seen him occasionally, I was [14] with the minister, and at that point was the very first time that I had any knowledge of Mr. Ford thinking that he was no longer on Death Row. At that point in time for the first time I had heard he began talking about the case of Ford versus State as he calls it. And he explained that Ford versus State had overturned the current death penalty statute in Florida, had required that the death sentence be imposed by panels of twelve judges, and that he was no longer under sentence of death. In fact he was free to leave the prison but that he had decided that he would stay. At that point in time—

THE COURT: October, when, '83?

MR. BURR: October the 14th, '83, I believe was the exact date. October of '83. Within a week thereafter we did something. We invoked the statutory procedure in Florida, Section 922.07 for the Governor to inquire into his competency to be executed. That was the very first time that we had any knowledge of his underlying psychotic processes invading his ability to understand the nature and effect of the death penalty.

At that point in time in the law we were not certain whether the administrative remedy under 922.07 was something that we had to follow in order to adopt our remedies before moving into Federal Court or whether we could move into Federal Court immediately. We

determined, on the basis [15] of what we understood the law to be then—

THE COURT: Go ahead.

MR. BURR: We determined, "we," meaning I and my colleagues at the Public Defender's Office determined that the safest course was to proceed through the administrative remedy first prior to moving into Court so that there would be no question about exhausting all available State remedies. We did that. We invoked the procedure. Governor Graham appointed three psychiatrists to go evaluate Mr. Ford. We spoke and communicated with those psychiatrists in advance. We were present at their evaluation of Mr. Ford. We were provided their reports thereafter. And we filed a written response to their reports. Interestingly enough though, during the entire process, the Governor's office, when I would make inquiries of the Governor's office as to when they would like something from me or whether I would have the opportunity to submit input, the Governor's Office took the consistent position that we could give them whatever we wanted to but they weren't sure whether they would consider it or not. We did have the opportunity in November after we had invoked the procedure, but before the Governor's psychiatrists saw Mr. Ford, we had the opportunity for Mr. Ford to see Doctor Kaufman and Doctor Kaufman prepared a report which we provided to the Governor and to the psychiatrists that he appointed. We, I believe, submitted [16] to the Governor in writing, again not knowing whether it would be even read or not. At the end of February, 1st of March of 1984, and about a month later—I'm sorry, two months later on April the 30th, Governor Graham answered the question posed by 922.07 by signing the death warrant which represents his conclusion of that proceeding.

At that point we knew that we needed to move into Court and we moved into Court as quickly as we were able. The circumstance that intervened between April 30th and the middle of May was our representation of

another client, James Adams, who was ultimately executed and for whose case our entire capital staff was working on that case.

So that's the sequence of events. If there is any questions I submit about the factual representation that I make, that I have made in this argument, seems to me the only proper way to resolve that is for me to be sworn as a witness and questioned and to answer under oath because it is a factual question and I, as the person in this office who has had the ongoing contact with Mr. Ford and the person that is uniquely possessed of the knowledge upon which our office acted or should have acted on behalf of Mr. Ford.

With that as the factual background, the question of abuse of the writ comes into this. Abuse of the writ, as the Court knows, applies to a successive petition which raises an issue that could have been raised in the first [17] petition but was not. If there is such a situation, abuse of the writ would be found. The law is very clear on that and well settled. The law is equally well settled that if there is no factual basis to raise a claim there can be no abuse of the writ if the factual basis arises after the 1st proceedings. And that is precisely where we are here. The factual basis was not available before October of 1983 and at that point in time the case had left the Court, had gone through the U.S. Court of Appeals and had had certiorari denied in the U.S. Supreme Court. There was a limited remand pending between October and March of 1984 limited to a single narrow question which the Court has already now disposed of. We did not think we had an opportunity to supplement that proceeding because it was the mandate that had issued had limited the remand to the single issue under Barclay.

So with that analysis, we submit there is no question of abuse of the writ. Claims could not have been raised, if the facts which we have alleged in support of our claim are true could not have been raised. The claim did not arise until after the first proceeding was entirely complete.

The next question that comes is if abuse of the writ is not a bar, then is there any other procedural bar for this claim? We submit there is none.

[18] The State has argued the question of delay. The only delay issue, however, which can be considered in Federal habeas corpus is the issue of delay described in Rule 95 of the Rules describing habeas proceedings under Section 2254. That Rule incorporates the traditional Laches rule from equity. And the critical factor there is that the State be able to show in order to have benefit of that Rule of delay, that the State be able to show that the delay has prejudiced its ability to defend on the merits of the issue presented. The State has made no suggestion that the short delay between October and May has prejudiced their ability to defend against the merits of this issue at all. So where does that leave us? That leaves us with no abuse, with no delay and with the State in the middle saying somehow this has to stop, these eve of execution applications have to be put under wraps and done away with and you have to find either abuse or delay or some sort of equitable remedy barring the consideration of this issue. We submit there is none. There is abuse of the writ and there is delay. And those are the only two matters under the Federal habeas statute that can preclude the Court's ruling on the merits that is a Federal matter. Obviously there's procedural default, but that's not material to this issue.

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[Argument by counsel for respondent Wainwright:]

[38] I'd like to start off with the abuse of the writ argument and I'm going to apply it to all the claims that were raised in this particular petition.

I think to start with let's look at the background of abuse of the writ. I think the Fifth Circuit opinion in Jones versus Estelle is a very well reasoned opinion. It gives the Court background on when abuse of the writ should be applied. Jones versus Estelle talks about abuse

of the writ boils down to whether or not Petitioner can excuse his admission of claim from an earlier writ by proving he did not know of the new claims when the earlier writ was filed and we give examples when there has been a change in the law for development in the facts which was and I stress reasonably knowable before.

It is the State's position, and we are not disputing the facts presented by Petitioner here, that's [39] one reason why there is no reason to have evidentiary hearing on abuse of the writ. We are only disputing the interpretation of facts, and I don't think you need an evidentiary hearing for a dispute on the interpretation of facts.

I think also when you are talking about abuse of the writ, the Courts have recently added perhaps another element to abuse of the writ; that is the timing of the second petition. The Court in Autry versus Estelle as cited in the response and I think in Woodard versus Hutchins, Justice Powell talking for the majority of the United States Supreme Court said, and again it's important to know that Woodard versus Hutchins involved a claim of insanity again at the time of execution but there were new facts which had arisen from the time of trial to the time of execution which Mr. Woodard is now insane. Justice Powell said "This is another capital case in which a last minute application for stay of execution and new petition for habeas corpus relief has been filed with no explanation as to why the claims were not raised earlier or why they were not raised in one petition. It is another example of abuse of the writ." So I think from reading that you can read the interpretation that one of the factors to consider in whether or not there has been abuse of the writ is the timing of the second petition; and that is what the State is relying on.

I want to make it clear we are not arguing delay [40] as Petitioner has set out. Delay only inasmuch as the timing of the second petition, not because we cannot respond on the merits.

I'd like to go over the facts just from the Defendant's own pleading in this particular case. This is quoting from Petitioner's petition itself:

"On December 5, 1981, Mr. Ford's health and normalcy began to give way." This is at Page 13 in the petition. "By February 28, 1982, Mr. Ford's"—

THE COURT: December 5th was the first day of hearing.

MS. BRILL: That's correct, Your Honor. That's why I'm quoting. I'm quoting from the Petitioner, from Counsel's own words; so we are not talking about disputive facts. These are his own words that are in his petition.

At Page 13 he says that "His health and normalcy began to give way. Then by February 28, 1982, Mr. Ford's delusional system had taken a quantum leap." This is at Page 16. "By April 17, 1982, Petitioner showed some further advance in his delusional systems accompanied by the injection of paranoia into his delusions as well as the re-emergence of his loosening of associations. By July 8, 1982, Mr. Ford's remission ended." And he goes on later at Page 31, "By September 11, 1982, Mr. Ford's delusional system had become all-pervasive and all-encompassing. There [41] has been no remissions from the grip of the delusion, the loosening of associations and the hallucinations since then. Then on September 12, 1982, three new aspects to the delusion emerged." That is at Page 37. Then at Page 39 Petitioner alleged, "On October 22, 1982, Mr. Ford began to report yet another new development in his delusion, one that, over the course of the next year and beyond, would become the most significant element in his world of delusions—the taking of hostages by the persons who were already tormenting him at Florida State Prison. Then by May 10th, 1983, Mr. Ford's delusions became increasingly grandiose, a new element entered the delusions. Then, in the last letter available from Mr. Ford on No-

vember 28, 1983, "Petitioner alleges at Page 53 of the Petition, "That Mr. Ford was still grandiose, but his delusional systems seem to have changed significantly in content. His form of communication was becoming quite esoteric and incoherent, as commonly occurs in severely psychotic individuals."

Thus, it is the State's position from Counsel's own words which are in the petition that there were facts which were available to his support in good faith assertion as to the Petitioner's mental capacity to be executed. This is long before October 20, 1983, when he invoked the procedures under 922.07.

I think it is important to remember the issue in [42] the case is not the issue of the Petitioner's competency in fact; but the issue is whether or not he is entitled to, procedurally entitled to judicial determination of competency as opposed to being forced to rely solely on the Governor's determination.

Now Counsel has not given any reason why he could not have brought forth back in, let's take from December, from the day when the Governor appointed the three psychiatrists who all found Mr. Ford competent to be executed, why he couldn't at that point, from December 1983 until he finally files some sort of petition in State Court on May 21, 1984, ten days before his execution, he could not have filed some sort of proceedings in State Court and then into the Federal Court asking that he should have judicial determination of his competency. This is never done until ten days before the execution.

THE COURT: December of '83 was when the examination was.

MS. BRILL: Yes. And I believe within a couple of weeks after that all three psychiatrists had reported that Mr. Ford was competent and understood the reasons that he was to be executed and reasons why he was to be executed. And from that point on Counsel never did anything to bring this issue to the attention of any Court in

the State's system or in the Federal system until May 21, ten days before Mr. [43] Ford's scheduled execution.

Furthermore, I think it's important to note some additional history. After the Defendant initially filed his first habeas petition in this Court on December 2nd, 1981 and this Court denied the petition on December 7th entering your written order on December 10th, the case then progressed to the Eleventh Circuit, through the panel decision and the en banc decision which was rendered by the Eleventh Circuit on January 7, 1983; and in that order of January 7, 1983 there was an order for remand to remand this case back on the Barclay issue. Now at that time according to Petitioner's own statements Mr. Ford was suffering under some very heavy delusions at this point in January of 1983. Yet Counsel never asked the Eleventh Circuit in that remand can we add an additional claim as to his competency to be executed. He moved for a re-hearing in the Eleventh Circuit, I believe, on January 28th, but in that new motion for re-hearing of the en banc decision, he never asked for it, to have that, the remand to this Court, expanded to include other claims that have since arisen. And I think the facts certainly by then were available for Counsel to have done so. And especially I think that that idea of asking the Court or having this Court take jurisdiction over the new claims is supported by the Eleventh Circuit's recent decision in Thompson versus Wainwright which is at 714 F 2d 1495 and [44] Arango versus Wainwright, which I had cited in the response. In both those cases the Eleventh Circuit has held that the District Court has the authority to continue a case to allow petitioners to either amend the petition, file a second petition, consolidate them, and leaving that petition dormant on the district court docket while the Petitioner goes back to exhaust the State remedies. So he could have done that. But he didn't. Instead his claim is dormant, stays quiet until ten days before the execution.

I think the instruction in *Goode versus Wainwright* in the Eleventh Circuit is applicable here. In *Goode* the Court said that a showing of changed conditions does not mean that post-conviction insanity can be held back of an issue until the eve of execution and then raised for the first time. And again in *Hutchings versus Woodard* the Supreme Court stated that a pattern seems to be developing in capital cases of multiple review in which claims could have been presented years ago or brought forth or in piecemeal fashion only after the execution date is set or becomes imminent. Federal Courts should not continue to tolerate even in capital cases this type of abuse of the writ. And it is the State's position this Court should not either.

* * * *

[Rebuttal argument by counsel for petitioner Ford:]

[61] Finally on the issue of abuse. It seems to me that Ms. Brill's presentation leaves us in the following posture on abuse. She says that if you read through the pleadings starting with the letter of December the 5th, you find that we have alleged various facts which could have been a good faith basis to assert a claim of incompetency. The letter of December the 5th that she referred to where normalcy began to give way I had not seen until sometime later. So when I represented to you before that on December [62] the 5th Alvin Ford seemed fine to me I wasn't aware of that letter; but at the time it would not have mattered because Alvin Ford sitting in front of me appeared to be competent.

It's terribly important to differentiate between the process of an evolving psychosis which has been going on with Alvin Ford for the last two-and-a-half years and when the level of psychosis and quality of psychosis makes someone incompetent to be executed. They are very different analyses, very different factual phenomenon. Someone can be terribly psychotic for a long time and still have an understanding as to where he is and why he

is there. And that's the issue. If there is any question about when we, as Mr. Ford's Counsel, first had notice that he did not understand where he was and why he was there, which are critical competency facts then we should have a hearing; otherwise, our representation that we first knew about this in mid-October 1983 stands undisputed. We have simply alleged the fact of his growing psychosis to demonstrate the genuineness of the condition that has led to his incompetency. If there is any question about when it first came to our attention, a hearing on it ought to be held.

. . . .

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 84-6493-Civ.-NCR

ALVIN BERNARD FORD, ETC., PETITIONER

vs.

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

[ORDER TRANSCRIBED IN RECORD OF HEARING]

* * * *

[63] THE COURT: If matters like this weren't so serious, I'm sure someone like that fellow on 60 Minutes that does these humorous observations could really do one on us in this situation. I haven't ruled yet and I understand there's already been a motion to stay filed in the Court of Appeals and a response by the Attorney General's Office and the Florida Supreme Court is already asking questions about what happened.

Well what happened so far, I guess, is somewhat predictable. It's kind of like watching Casablanca on TV. You know about every three years it comes around again. And almost three years ago I had this case before and I dropped everything and heard it all day Friday and all day Saturday and all day Monday and issued my order, and by the time I issued the order the stay was already entered in the Court of Appeals from December of that year to the following October and issued a mandate that they did agree with my opinion and they established a lot of law for this Circuit in the process.

The first contention of the Defendant seems to be 922.07 is—They don't contest the constitutionality of it; they just contend that even if the Governor follows the statute that is not enough, there's still got to be an independent judicial review when the question of competency [64] is raised. I don't find any support for that theory at all. Certainly not in Goode versus Wainwright which was the

decision handed down April 4th, 1984, by the Eleventh Circuit, and as I recall, that also was the same date Judge Hodges entered his opinion in Tampa in the Lower Court. And that explains the urgency of these things because the execution was scheduled for the next day, and in this situation, the warrant, which has been signed by the Governor, the warrant of execution must be carried out by the 31st of May and this is now the 29th and so there is good reason for all this planning in advance the system tries to anticipate and still give as complete a review.

The matter was filed in this Court on Friday last a couple minutes before 5:00 o'clock and after the Supreme Court of Florida had denied the relief sought by Petitioner earlier in the day. Of course 5:00 o'clock Friday began the holiday weekend and this is now the first working day after the holiday.

Counsel have presented extremely good argument, I think in your memoranda and in view of the flood and torrent of recent decisions on the matter I've got to believe at this point that such excellence either results from an extreme professional interest in these questions or the fact that you anticipate there's going to be one gigantic last-minute deluge of pleadings and so the [65] preparation is made in advance.

This matter was not started in the State trial court until May 21st following the filing of the Governor's writ of execution and the reason given by Counsel for Petitioner for that delay for the period of time in May was because of its being tied up with the Adams matter, and Mr. Adams was executed also sometime in May.

There are two or three—Well two basic claims in this matter. One that the Petitioner Ford has become incompetent and therefore cannot be executed; and secondly, that the instruction as to the majority vote denied his right to have the jury instructed on the question of the majority vote on the issue of the recommendation of life vis-a-vis death penalty.

As to the matter of incompetency. In December of 1981 when I considered this question before, had an extended evidentiary hearing and appeals were taken, there were, as I recall, seven issues. None of those dealt with the question of competency. There are several disturbing facts about it, and that is the claim now that in December of 1981, at the time of the hearing Mr. Ford became incompetent, and in fact as I recall there was some testimony to that effect by Doctor Amin at the time of the hearing. And Doctor Amin, as I recall, was the psychiatrist, forensic psychiatrist. He was the only one in the State of Florida and he felt [66] nobody else but him could be a valid witness in the matter. I am trying to find the refutation Doctor Amin made. In this flurry I have read it but I have not made a note of it. He made a comment then that would have triggered anybody, I think, into seeking some form of judicial determination about the question of—I apologize that in the rush of this thing I just cannot put my finger on it—And I made some notes as to matters present in the argument by Counsel and Ms. Brill made a number of comments during her argument and I think those are worth re-examining.

The petition for writ of habeas corpus filed by Defendant Ford, "On December 5th, 1981," which by the way was the first day of the hearing before me in 1981, "health and normalcy began to give way." There used to be some debate about the word "normalcy," whether or not it was a real word, but one popularized by a fellow resident of my home county, President Warren Harding. There are many people who criticize that word as being an improper word; however, I do think Harding has been borne out in this as he has in some other things. And then "by February 28, 1982, Mr. Ford's delusional system had taken a quantum leap." My notes indicate that something more specific had happened by that time; that Mr. Ford had become obsessed with a reference to the Ku Klux Klan. And then in April he "showed some further

advance in his delusional systems, accompanied [67] by the injection of paranoia into his delusions as well as the re-emergence of his loosening of associations." I take it those are psychiatric phrases because I don't know any lawyers that talk that way. "By July 8, 1982, Mr. Ford's remission ended." However, by August of '82, the Defendant Ford thought Doctor Amin was his persecutor and refused to see him. It is at that point the Defendant, Counsel at least, wanted Ford to see Doctor Harold Kaufman in Washington D.C. in January of '83. And there was some dispute with the prison authorities, whether Strickland or Wainwright or the hierarchy there because they refused to treat Mr. Ford.

I think it significant to note that although they refused to treat him in January, February of 1983, nothing, absolutely nothing was filed to compel treatment. I don't understand that at all. Such a major inconsistency in all this.

Mind you, before we get to January 1983, Page 31 of the petition, "Mr. Ford's delusional system had become all-pervasive and all-encompassing." Same page: "There has been no remission from the grip of the delusion, the loosening of associations, and the hallucinations, since then," September of '82. And so, September 12th, a day later, "Three new aspects to the delusion emerged. On October 22, 1982 Mr. Ford began to report yet another new development in his [68] delusion, one that, over the course of the next year and beyond, would become the most significant element in his world of delusion—the taking of hostages by the persons who were already tormenting him at Florida State Prison."

Move on past January and failure to file suit. By May 10th, 1983, "Mr. Ford's delusions become increasingly grandiose, a new element entered the delusions," Page 48 of the petition. The last letter available, November 28, 1983, "Mr. Ford was still grandiose, but his delusional system seemed to have changed significantly in context. His form of communication was becoming quite esoteric

and incoherent, as commonly occurs in severely psychotic individuals."

I ruled on this matter previously on December 8th of 1981, a stay was entered that night and when it moved into the Court of Appeals and it remained there as I said for about 22 months. There was a panel opinion decision and then it went en banc and the Court of Appeals en banc handed down a major decision on these issues affecting death sentences particularly in the State of Florida as well as throughout the Circuit in Ford versus Strickland. That key situation came down January 7th, 1983.

Barclay decision was already in the Supreme Court and there was some congruity between that decision, at least in the sphere of applicability between that Barclay decision and Ford, and in the end of the opinion, the Court affirmed [69] this Court but remanded it for any further effect that the Barclay decision might have on it. Barclay came down last July, July of '83, about July 6th.

The next date that really strikes me as being significant in all this is October the 11th, 1983. That's significant folks, because that's the date the mandate was entered by the Court of Appeals remanding it to this Court. It was a Tuesday. That's significant because on the 14th of October, three days later, just about time for the mandate to come down, be received, there was a meeting between Counsel for Mr. Ford and Mr. Ford and about a week later was the assertion of Counsel they invoked Section 922.07. Now what I deduce from all that is this is absolutely a classic pattern of a Defendant allegedly having a mental problem and perceiving a rook card in their possession, a high trump shall we say and holding it in the vest pocket until the last minute and then the minute the mandate came down they played the card and invoked 922.07.

The pattern did not end there. It continued. 922.07 was followed. The Governor appointed three psychiatrists. They examined him in the presence of the Defense Counsel, received submissions from the Defense Counsel and

returned their report a couple weeks after that examination. The examination was in December of 1983. Still nothing other than the request for 922.07.

[70] And as the Court of Appeals pointed out in Goode, Defendant was free to assert this contention that he could not be executed because of post-conviction insanity in State and Federal Courts from the time that the State Court sentenced him to death; thereby he could secure an orderly determination of his then current mental condition. Certainly, he could have raised the issue when the Governor signed his first execution warrant in 1982. Goode has made no such contention in his State merits appeal, in his State collateral attack on his conviction or in his first Federal habeas case.

Certainly sounds like they are talking about the Defendant Ford.

The contention of the Defendant, however, is Goode doesn't cover this case like a blanket because Goode had raised the question of competency to stand trial in his first Federal habeas. But it raised that question and the Defendant perceives that this thereby is a judicial invitation to a clear, fast track for habeas corpus relief as to the death warrant in this case.

I don't find anything in the cases or certainly in Goode that would indicate any such solace for the Defendant.

Instead we find again as I indicated earlier that it was filed on May 21st, ten days prior to the expiration of the writ of execution, filed a motion for [71] hearing and appointment of experts for determination of competency and motion for stay of execution in the State trial court, knowing that the route of litigation at that point has to be the State trial court, the State Supreme Court and then inevitably here and then inevitably the Court of Appeals and then inevitably the U.S. Supreme Court in ten days.

This is not the first time this type situation has come up obviously because Justice Powell referred to another one in Woodard as an example of abuse of the writ in

a capital case when there is a last minute application for a stay of execution and new petition for a writ of habeas corpus is filed with no explanation as to why the claims were not raised earlier. There has been an explanation advanced but I don't find any credibility to it or why they were not all raised in one petition. There is no doubt in my mind that this was all held back until the very last minute and these five Courts have been plunged into this frantic last-minute drop-everything and turn their attention to this one petition. It's just got to be a gross abuse on the system as well as an abuse of the writ.

I find that there is an abuse of the writ throughout this matter. But reaching the merits of the matter as well I find no reason to grant the relief sought by the Petitioner. The Governor of this State acting under 922.07 [72] the Court finds that he has acted properly, has followed the steps. Each of the three psychiatrists whom he appointed has found the Defendant sufficiently competent to be executed under the law and so on the merits, as well as on this issue, the petition must fail.

As to the matter on the instruction, the merits of that also the Defendant can only present conjecture of prejudice and ignores the findings of the trial court that all eight aggravating circumstances were there. Even though the Supreme Court of Florida subsequently decided that one of those aggravating circumstances was a duplicate of another one set forth in the statute, the two others were not supported, they still probably supported the death sentence imposed by the State trial judge. I cannot read this comment of one juror to indicate that there was some prejudice to the Petitioner at that time in connection with the sentence or recommendation as to the sentence.

Petition is denied because I think it is an abuse of the writ.

I will also deny the granting of a certificate of probable cause.

Inasmuch as Mr. Ford is a pauper, I have no choice but to saddle the taxpayers with the preparation of an instant transcript and it is so ordered.

I will deny your application for a stay.

[73] MS. SHEARER: Your Honor, I have prepared some proposed—

THE COURT: I will not file any written order. There isn't time.

MS. SHEARER: I just had an order directing the transcript be prepared and an order that the oral findings be the order of the Court.

THE COURT: These oral findings are considered as the Court's findings and conclusions, my findings from the bench. I don't see how anybody has time to do anything else. I marvel at my fellow judges that are able to get out an opinion under these conditions.

MS. SHEARER: Well would you consider signing these orders or would you rather—

THE COURT: May I see it? I don't agree to anything in advance. My lawyer told me never to sign anything without reading it.

I think it's exactly what I just did but I will sign it. Thank you very much.

I appreciate all the hard work everybody has done.

Thank you.

MR. BURR: Your Honor, I have orders denying probable cause if you would like a separate written order.

THE COURT: If you'd like it, I will sign it.

[74] MR. BURR: Thank you.

And we would apply for a stay pending appeal, and I think I know what the order would be on that as well. There is an order denying that.

THE COURT: I figure my work is done. If the Court of Appeals wants to stay it, they may. They don't agree with me on that procedure. Just seems to me that's clearly where it fails. And I will call the Court of Appeals right now to tell them of the rulings I have made.

. . . .

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-5293, 84-5372

ALVIN BERNARD FORD, PETITIONER-APPELLANT

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State
Penitentiary, Louie L. Wainwright, Secty., Dept. of
Offender Rehabilitation, Florida, and Jim Smith, Atty.
Gen., Florida, RESPONDENTS-APPELLEES

ALVIN BERNARD FORD, or CONNIE FORD, individually,
and acting as next friend on behalf of
ALVIN BERNARD FORD, PETITIONERS-APPELLANTS

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida, RESPONDENT-APPELLEE

May 30, 1984

Before HENDERSON, ANDERSON and CLARK,
Circuit Judges.

PER CURIAM:

In Case No. 84-5293 we deny the application for a certificate of probable cause and we deny the application for stay of execution. The single issue raised, i.e., the *Barclay* issue, requires no discussion.

In Case No. 84-5372, we grant the application for a certificate of probable cause, and we grant the application for a stay of execution, finding that two of the grounds asserted warrant this relief.

First, Ford asserts that he is entitled to a procedural due process hearing to determine whether he is currently insane. If so, this should delay his execution because such could be cruel and unusual punishment and thus proscribed by the Eighth Amendment. Ford has raised a substantial question and we stay his execution so that a panel of this court may answer it. Credible evidence presented by the petitioner indicates that Ford is insane. Two psychiatrists appointed by Florida's Governor found him psychotic.

The Supreme Court has not yet decided whether infliction of the death penalty upon an insane condemnee is cruel and unusual punishment within the meaning of the Eighth Amendment. See *Caritativo v. People of the State of California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed. 2d 1531 (1958); *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); *Nobles v. Georgia*, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897). The Florida Supreme Court in holding that Ford was not entitled to a due process hearing relied upon *Solesbee*. At the time of *Solesbee* the United States Supreme Court had not applied the Eighth Amendment to the states through the due process clause of the Fourteenth Amendment. In *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Supreme Court incorporated the Eighth Amendment right to be free of cruel and unusual punishment to the states. For still another reason, *Solesbee* seems of dubious support. Since that time, as a result of *Furman*, the Supreme Court has drastically altered the constitutional framework in which a citizen in this country can be executed.

We believe the district court erred in holding that Ford violated Rule 9(b) of the Rules governing § 2254 cases. The district court dismissed the petition on the ground that the petitioner should have asserted the insanity ground in his prior petition and that he thus abused the writ.

The district court made this ruling without taking any evidence. We then have been caused to review the factual context of Ford's first petition for the writ, which was considered in December of 1981 by the district court. Neither the evidence at that hearing, which we have reviewed, nor the district court order reflects that the district court was presented with an issue of Ford's insanity at that time. The record does reflect that in late 1981 and in 1982, counsel for Ford became apprehensive about his mental state and sought psychiatric examinations for Ford. From December of 1981 until October of 1983, Ford's case was on appeal to this court and to the United States Supreme Court from the district court's denial on December 10, 1981, of Ford's petition for writ of habeas corpus.

Since we find no evidence in the record to suggest that the incompetency issue was available in December of 1981 when Ford's first petition was filed, we conclude for the purpose of staying Ford's execution that there was no abuse of the writ.

The state argues that Ford should have filed a petition for some type of relief with respect to the insanity issue before filing the petition now under consideration.¹ However, the state does not explain to us just what Ford should have filed and when. On October 20, 1983, Ford, through his attorneys, sought exhaustion of state remedies pursuant to Florida Statute § 922.07. This was after the mandate issued from the court on October 6, 1983. The Governor did not render a decision with

¹ We have found no precedent, and none was cited by the State, holding that it is a per se abuse of the writ to fail to file a second habeas petition while the first petition is still pending. Assuming that the law might and should evolve to impose such a duty, we would not be inclined to do so without the benefit of an evidentiary hearing to give Ford and his counsel an opportunity to explain their actions. Such actions would fall more clearly under Rule 9(a) of the Rules governing § 2254 cases, allowing dismissal of delayed petitions if the State's ability to respond is impaired. However, the State makes no such argument here.

respect to the § 922.07 proceeding until he signed the death warrant.

If Ford had filed a petition for an evidentiary hearing with respect to insanity in the state courts, he would most probably have been met with a ruling that Ford's sole relief was pursuant to Florida Statute § 922.07. In this very case, the Florida Supreme Court held that "the statutory procedure is now the exclusive procedure for determining competency to be executed." *Ford v. Wainwright*, 451 So.2d 471 at 475 Supreme Court of Florida, May 25, 1984. We believe if Ford had filed in the United States District Court for such relief, his petition would have met the same fate.

We conclude that this court's opinion in *Goode v. Wainwright*, 731 F.2d 1482 (1984), does not control this case. There, Goode's claim of incompetency came after he had been twice adjudicated competent in state court proceedings which were affirmed by our court. Thus, there were clear grounds for abuse of the writ in the *Goode* case because at the time of the filing of the successive petition, Goode had asserted the insanity ground in a prior proceeding.

Because we find that Ford's petition for relief filed in the district court did not constitute an abuse of the writ and because we believe his claim of privilege not to be executed while insane raises substantial procedural and substantive Eighth and Fourteenth Amendment grounds, we stay the execution on this first issue.

Ford's second ground for relief is his argument that Florida administers the death penalty arbitrarily and discriminatorily on the basis of the race of the victim, the race of the defendant, and other impermissible factors, in violation of the Eighth and Fourteenth Amendments. The district court rejected this claim as an abuse of the writ.

This issue, in the context of the Georgia death penalty statute, is now pending en banc consideration in this circuit. *Spencer v. Zant*, 715 F.2d 1562, *vacated for rehearing en banc*, 715 F.2d 1583 (11th Cir. 1983);

McCleskey v. Zant (11th Cir. 1984) (oral argument scheduled for June 12, 1984).

As we noted in *Adams v. Wainwright*, 734 F.2d 511, 512 (11th Cir. 1984). "The state of the law with respect to these issues is unsettled." In chronological order, see *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (rejecting argument that the Florida statute was being applied arbitrarily, and discriminatorily in violation of the Eighth and Fourteenth Amendments because statistical evidence proffered was insufficient), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), *Smith v. Balkcom*, 671 F.2d 858 (5th Cir. 1982) (denying Eighth and Fourteenth Amendment claims because statistics unreliable, but stating "in some instances circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but . . . racially discriminatory intent or purpose"); *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983) (same), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Spencer v. Zant*, 715 F.2d 1562, 1578-83 (remanding Eighth and Fourteenth Amendment challenges for evidentiary hearing); *Spencer v. Zant*, 715 F.2d 1583 (1983) (vacating panel opinion, 715 F.2d 1562, for rehearing en banc); *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir. 1983) (following *Spinkellink* and *Adams*), *petitions for stay of execution denied*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Stephens v. Kemp*, 722 F.2d 627 (11th Cir. 1983) (denying petition for rehearing en banc with six judges dissenting), *Stephens v. Kemp*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983) (granting stay of execution pending Eleventh Circuit's en banc consideration of *Spencer*); *Smith v. Kemp*, — U.S. —, 104 S.Ct. 565, 78 L.Ed.2d 732 (1983) (denying petition for rehearing from denial of certiorari; *Adams v. Wainwright*, 734 F.2d 511 (11th Cir. 1984) (granting stay pending en banc consideration of *Spencer*), *vacated without opinion*, — U.S. —, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984).

Our effort to faithfully apply the principles enunciated by the Supreme Court is unusually difficult in these cases. Because of time constraints under which these issues invariably arise, both this court and the Supreme Court have found it impossible in some cases to write an opinion providing a rationale for the decision.

We can discern two possible interpretations of the Supreme Court's recent treatment of this issue; either (1) the Supreme Court sees some significant difference between the contours of the issue as it has been presented in the Florida context, as opposed to the Georgia context, or (2) the procedural posture of cases has been decisive, in that the Supreme Court has declined to entertain this issue when the issue was repeated on the merits in a prior petition.

The State argues with considerable force that the Supreme Court declined to stay the Florida executions in *Sullivan* and *Adams*, while granting a stay of the Georgia execution in *Stephens*, because of some significant (but unstated) difference between Florida and Georgia. Several factors undermine our confidence in the State's position. First, the position does not satisfactorily account for *Smith v. Kemp*, —U. S. —, 104 S.Ct. 565, 78 L.Ed.2d 732 (1983), in which the Supreme Court, when presented with this issue, declined to grant a stay of a Georgia execution to reconsider its denial of certiorari. Instead, the Supreme Court's action in *Smith* is readily explained by the procedural posture, *see infra*. Second, no Justice of the Supreme Court and no judge of this court has expressed the view that there is a difference between the issue as presented in Florida, as compared to the issue as presented in Georgia. Third, although pressed at oral argument, counsel for the State could not point to any facet of the evidentiary proffer which might distinguish Florida from Georgia. Finally, our own study of the two proffers (e.g., the Baldus study in Georgia and the Gross and Mauro study in Florida) leaves us

unpersuaded that there is a significant difference between them.²

The other possible interpretation of the Supreme Court cases is that the procedural posture has been the distinguishing factor. In both *Smith* (Georgia) and *Adams* (Florida), in which stays of execution were denied, the issue was presented as a successive petition after the same claim on the initial position had been rejected on the merits. Although *Stephens*, in which the Court granted a stay of execution, involved a second or successive writ, it did not involve an attempt to relitigate an issue which had already been rejected on the merits in a prior writ of habeas corpus. There is a well-established distinction in the case law, see *Sanders v. United States*, 373 U.S. 1, 15-19, 83 S.Ct. 1068, 1077-1079, 10 L.Ed.2d 148 (1963), between the *Stephens* posture, in which the rather more difficult abuse of the writ must be shown, and the *Smith-Adams* posture, in which the writ will be denied unless the "ends of justice" require otherwise.

As might be expected, Ford urges that we adopt the procedural distinction between his case and *Adams* because *Ford*, like *Stephens*, involves a successive writ, which can be barred only by a showing of abuse of the writ. This interpretation, however, must account for *Sullivan*, in which the Supreme Court declined to disturb

² Substantive differences between the Baldus study on Georgia and the Gross and Mauro Florida results are not readily apparent. Both studies examined a number of factors potentially influencing the imposition of the penalty under the respective statutes and corrected the deficiencies in methodology and results that characterized studies previously found inadequate to state a claim. Both studies respectively concluded that, all legitimate sentencing variables held constant, in Florida and Georgia: (1) a white victim murder is significantly more likely to result in a death sentence than is a black victim murder, and (2) a black perpetrator is more likely to receive a death sentence. The Gross and Mauro study expressly compared its results to the Baldus results, and found them comparable. Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, man. pp. 105-110 (October 1983).

this court's denial of a stay, declining to grant a stay of execution pending the filing of certiorari. Our brother, J. Henderson, places his reliance on *Sullivan*, and we readily acknowledge, in this uncertain state of the law, a reasonable basis for his position because *Sullivan* involved a successive writ in the same abuse of the writ posture as this case and *Stephens*. However, two factors persuade us that *Sullivan* is not controlling.

The first is that the decision in *Sullivan* to deny a stay was not a decision on the merits of Sullivan's constitutional challenge. As we recently noted in *Ritter v. Smith*, 726 F.2d 1505 at 1511 & nn. 16-17 (11th Cir. 1984), denial of a stay pending filing and disposition of a writ of certiorari "imports no more than a decision to deny certiorari, which does not express any views on the merits of the claims presented." *Id.* at n. 16 (citing *Graves v. Barnes*, 405 U.S. 1201, 1204, 92 S.Ct. 752, 754, 30 L.Ed.2d 769 (1972) (Powell J. in chambers)).

The second and more important factor is that *Sullivan* was decided before the Eleventh Circuit voted in *Spencer* to consider the issue en banc and before the Supreme Court granted the stay of execution in *Stephens*. *Sullivan* was decided on November 29, 1983. The *Spencer* issue was voted en banc on December 11, 1983. Also on December 11, 1983, six judges of this court dissented from an order denying en banc rehearing of the panel order denying a stay in *Stephens v. Kemp*, 722 F.2d 627 (11th Cir. 1983) (Godbold, Chief Judge, Johnson, Hatchett, Anderson and Clark, Circuit Judges, dissenting) (Kra-vitch, Circuit Judge, dissenting on similar grounds), stating that *Stephens* presented the same issue that the en banc court would consider in *Spencer* and that the issue "beyond peradventure . . . presents a substantial question in this circuit." *Id.* at 628. Thereafter, on December 13, 1983, the Supreme Court in *Stephens* granted a stay of execution "pending decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer v. Zant*." — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983). Thus the Supreme Court in *Sulli-*

van was not presented with an argument that the issue was a substantial issue in this circuit because of its pendency en banc,³ an argument which was later apparently accepted in *Stephens*. We thus conclude that *Sullivan* is not controlling.

Thus, our best judgment is that the Supreme Court cases do not distinguish Florida from Georgia, but rather teach that we should not be entertaining an attempt to relitigate this issue in a successive petition when the issue has already been rejected on the merits in a prior petition. By contrast, the issue can be entertained in a second habeas petition where there is no abuse of the writ. *Stephens*.

We conclude that Ford's assertion of his Eighth and Fourteenth Amendment claims was not an abuse of the writ. Just as in *Stephens*, where the Supreme Court granted a stay, the evidence and legal precedent upon which Ford relies were not available at the time of his first habeas petition. Unlike *Adams* and *Smith*, *Ford* is not seeking to relitigate an issue previously presented and dismissed on the merits.

We have also determined after close scrutiny that Ford presents a claim that in substance is identical to the issues currently under consideration in *Spencer* and *McCleskey*, and is the same claim that led to a stay in *Stephens*. Accordingly, finding in regard to this issue that Ford has presented "substantial grounds upon which relief may be granted," *Barefoot v. Estelle*, — U.S. —, —, 103 S.Ct. 3383, 3395, 77 L.Ed.2d 1090, 1105 (1983), we alternatively grant his application for a stay of execution pending en banc consideration of *Spencer*.

For the two foregoing reasons, in case number 84-5372, we GRANT the certificate of probable cause and STAY the execution.

³ In fact, footnote 3 of the *Sullivan* opinion reflects the Supreme Court's then understanding that the issue before the *Spencer* panel was merely that the district court had not had an opportunity to consider the proffer.

HENDERSON, Circuit Judge, dissenting:

At the outset, I note my agreement with the majority's view that neither the *Barclay* harmless error issue nor the jury instruction claim merit habeas corpus relief. I disagree, however, with the views expressed by the majority that either Ford's mental incompetency argument or the allegation of arbitrary imposition of the death penalty in Florida deserves serious consideration by this court.

Turning to the latter issue first, Ford claims that the death penalty is being imposed arbitrarily in Florida. He grounds this claim in a study written by professors Gross and Mauro. On several previous occasions, this court has addressed the validity of this study in a habeas corpus setting and found it to be inadequate. I see no reason to stray from our path of clear precedent.

In *Sullivan v. Wainwright*, 721 F.2d 316 (11th Cir. 1983), the petitioner challenged Florida's application of the death penalty based on this very same study. In denying relief, the *Sullivan* court found that the study was "[in]sufficient to show the Florida system to have intentionally discriminated" *Id.* at 317. The majority asserts that because *Sullivan* dealt with the disposition of a stay, it is not a decision on the merits. However, the clear wording of *Sullivan* indicates its clear intent to reach the merits. The majority also distinguishes *Sullivan* because it was decided before the Eleventh Circuit Court of Appeals voted to consider this issue en banc in *Spencer v. Zant*, 715 F.2d 1562, 1583 (11th Cir. 1983). This seems to be an indication that the full court's decision to consider the merits of the Baldus study as it applies to administration of the death penalty in Georgia has some bearing on the Gross-Mauro report in Florida. I do not agree with this evaluation and my conclusion has been reinforced by the recent disposition of *Adams v. Wainwright*, 734 F.2d 511 (11th Cir. 1984) (appeal from denials of second habeas corpus petition and motion for stay of execution).

The petitioner in *Adams*, a black convicted of the murder of a white, precisely as in this case, interposed a challenge to the arbitrary imposition of the death penalty in Florida. On appeal from the denial of a writ of habeas corpus, a majority of a panel of this court voted to grant a stay pending further consideration of this issue in the Georgia case. I dissented on the ground that the *Sullivan* panel previously addressed the validity of the Gross-Mauro study as it pertains to Florida and found it to be insufficient, a decision affirmed by the United States Supreme Court. See *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983). On appeal by the state, the Supreme Court dissolved the stay. Because of the factual similarity of this case to *Adams*, I feel a reiteration of the position I took in dissent in *Adams* is justified here.

The majority disagrees. It reasons that the Supreme Court's vacation of the stay in *Adams* was due to the fact that *Adams* previously had advanced this ground of relief in a prior petition. I cannot accept this reasoning. The differing procedural postures of *Adams*, who previously raised this point, and *Ford*, who does so now for the first time, have no bearing on the fact that both petitioners ultimately relied on the Gross-Mauro study which has been adjudicated lacking in substance. A different study affecting another state that has not yet been evaluated by any panel of this court is not relevant to whether Florida is properly administering its death penalty laws. Accordingly, on the bases of both *Sullivan* and the factually-similar *Adams*, I conclude that this claim does not justify our grant of the writ.

I note also the likelihood that this claim should be procedurally barred at this time since it was not asserted previously in *Ford*'s first petition for habeas corpus. Albeit unsuccessful when made then, as now, the ground for relief advanced in *Adams* was well-known and capable of prosecution at the time of *Ford*'s first

habeas corpus application. See, e.g., *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983) (unsuccessful assertion of claim of arbitrary application of death penalty prior to Gross-Mauro study). The information which forms the basis of such a claim has always been available. Petitioners cannot simply wait to state a claim until new study upon new study emerges when those reports are predicated upon currently available information. To withhold such a ground from an initial petition when the argument was known and available at the time is an abuse of the writ.

I also believe a similar procedural default bars our consideration of Ford's claim that he is presently insane and, consequently, is constitutionally immune from execution.¹ In light of the evidence presented in Ford's first federal petition for habeas corpus in December of 1981, it is evident that, even at that time, counsel for Ford had serious doubt about his mental capacity. Additionally, the record demonstrates that in June of 1983 counsel was well-aware of this potential ground of relief. See Report of Dr. Jamal Amin, App. 1, Petition for Habeas Corpus. Regardless of the exact time that his claim of incompetency ripened, however, Ford's counsel readily admits to their knowledge of this alleged deficiency in October of 1983. In light of this admission and the clear holding of the court in *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir. 1984), I conclude that the failure of counsel to bring this matter to the attention of a court until now to be an abuse of the writ.

In *Goode*, after this court denied the writ on appeal from the petitioner's first habeas corpus petition, the governor began his § 922.07 inquiry. On March 6, 1984, Goode filed a habeas corpus petition in the state court

¹ It should be emphasized that the state is in no way attempting to execute an insane person. On the contrary, Florida employs a statutory procedure to avoid that result, see Fla.Stats. § 922.07, which has been upheld under a due process challenge. See *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir. 1984).

which raised, *inter alia*, his incompetency to be executed. That petition was denied on April 2, 1984, and on the following day, he filed a petition in the district court which denied the writ on April 4, 1984 without a hearing. He then appealed to this court.

The state maintained that Goode's last minute attempt to avoid the consequences of the death penalty was an abuse of the writ under Rule 9(b). Goode contended in response that he was unable to assert his "newly ripened claim" until completion of the § 922.07 procedures. The court did not accept this argument, stating that his

theory assumes that the issue of insanity *vel non* barring execution is dependent upon the governor's implementation of the statutory procedures of § 922.07. This is not so. If Goode contended, on substantive due process and eighth amendment grounds, that he could not be executed because of post-conviction insanity, he was free to assert this contention in state and federal courts from the time that the state court sentenced him to death; thereby he could secure an orderly determination of his then current mental condition.

Id. at 1483 (footnote omitted). Therefore, even accepting Ford's best argument that a claim of incompetency did not ripen until October of 1983, *Goode* makes clear that federal habeas corpus relief was available at that time.

Ford seeks to distinguish *Goode* on the ground that Goode continually asserted his incompetency throughout the course of the proceedings while Ford claims it now for the first time. I fail to see the value of this distribution since Goode was allowed to pursue his successive claim only because it was "newly ripened," that is, the court did not view his claim of incompetency as a reallegation of the previous insanity plea but as a new and distinct assertion of post-conviction incompetence.

Thus, in the eyes of the *Goode* court, this ground was treated as a new claim for relief. This view is further evidenced by the court's admonishment that "post-conviction insanity [cannot] be held back as an issue until the eve of execution and then raised for the first time." *Id.*

In my view, the conclusion is inescapable that *Goode* binds squarely on our decision here today. Accordingly, because the issue of incompetency matured months ago at the very minimum, the failure to bring it to the federal courts until the eleventh hour is the sort of abuse condemned in *Goode*. I would affirm the judgment of the district court on all issues thereby denying both the stay of execution and the application for a certificate of probable cause.

SUPREME COURT OF THE UNITED STATES

No. A-980LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

v.

ALVIN B. FORD

On application to vacate stay.

May 31, 1984. The application of the State to vacate the order of the United States Court of Appeals for the Eleventh Circuit, dated May 30, 1984, staying the execution of sentence of death presented to Justice POWELL and by him referred to the Court, is denied.

Justice POWELL, with whom Justice WHITE and Justice BLACKMUN join, and with whom Justice STEVENS joins in Part I, concurring.

On May 30, 1984, the Court of Appeals for the Eleventh Circuit, reversing the judgment of the District Court, granted respondent Ford a stay of execution of the sentence of death set for no later than noon on Friday June 1, 1984. The Court of Appeals granted the stay on two separate grounds. First, it stated that Ford's claim that he is entitled under the Eighth and Fourteenth Amendments to a procedural due process hearing to determine whether he is currently insane [the "competency claim"] raises substantial issues that warrant review. Second, the Court of Appeals held that Ford's claim that Florida administers the death penalty in a discriminatory manner on the basis of race and other impermissible factors [the "discrimination claim"] should be held pending en banc consideration by the Eleventh Circuit of *Spencer v. Zant*,

715 F.2d 1562, vacated for rehearing en banc, 715 F.2d 1583 (CA11 1983).

I

The Court of Appeals found that Ford's claim of entitlement to a due process hearing on competency to be executed did not constitute an abuse of the writ of habeas corpus, and held that the District Court had erred in holding to the contrary. On the merits, the Court of Appeals stated that this claim "raises substantial procedural and substantive Eighth and Fourteenth Amendment grounds" that warrant review of Ford's federal habeas petition. The Court of Appeals reviewed the relevant record. In view of its findings, I cannot say in this case that the court abused its discretion in staying Ford's execution on this issue.* I concur, therefore, in the order of the Court denying the State's application to vacate the stay.

II

The Court of Appeals also held that a stay of execution should be granted so that Ford's discrimination claim could be held pending *en banc* hearing and decision by that court in *Spencer v. Zant*, *supra*. The District Court had found that Ford had abused the writ by failing to raise this claim in his first federal habeas petition. The Court of Appeals provides no convincing explanation for ignoring that factual determination. Moreover, the Florida Supreme Court held that Ford's discrimination claim was procedurally barred for failure to present it in a motion for post-conviction relief as required by Fla.R. Crim.Pro. 3.850. *Ford v. Wainwright*, — So.2d — at — — — slip op. at 4-5 (Nos. 65,335, 65,343 May 25, 1984). Neither the Court of Appeals nor the District Court found cause and prejudice to excuse this procedural

* This Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane, and I imply no view as to the merits of this issue.

bar. See *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Finally, we have held in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted. See *Sullivan v. Wainwright*, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *Wainwright v. Adams*, — U.S. —, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984). I am of the opinion that the Court of Appeals abused its discretion in also granting a stay of execution on Ford's discrimination claim pending its decision in *Spencer v. Zant*, *supra*.

Justice STEVENS, having joined in Part I above, is of the view that it is unnecessary to consider the discrimination claim presented in Part II.

Justice BRENNAN and Justice MARSHALL join in the order of the Court.

THE CHIEF JUSTICE, Justice REHNQUIST and Justice O'CONNOR would grant the State's application to vacate the stay of execution of sentence of death.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5372

ALVIN BERNARD FORD, or CONNIE FORD, individually
and acting as next friend on behalf of
ALVIN BERNARD FORD, PETITIONERS-APPELLANTS

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida, RESPONDENT-APPELLEE

January 17, 1985

Before VANCE and CLARK, Circuit Judges, and
STAFFORD,* District Judge.

PER CURIAM:

Over ten years ago, on July 21, 1974, Alvin Bernard Ford murdered a helpless, wounded police officer by shooting him in the back of the head at close range. Ford was captured, tried in state court and sentenced to death. The history of these events and the various steps in the judicial proceedings that followed are set forth in more detail in our original panel opinion, *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982), and in our 1983 en banc opinion, *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert denied*, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

* Honorable William H. Stafford, Jr., U.S. District Judge for the Northern District of Florida, sitting by designation.

The 1983 en banc opinion affirmed the district court's denial of Ford's habeas petition but remanded for a determination of the possible effect on this case of *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), which was then pending in the Supreme Court. That determination resulted in the district court's dismissal of Ford's petition on March 22, 1984. Ford's merits appeal and all collateral attacks to that point had been concluded with results unfavorable to him.

Before resolution of his first federal habeas procedure Ford invoked the procedures of *Fla.Stat.* § 922.07 (1983). The Florida governor appointed a commission of three psychiatrists to evaluate Ford's current sanity in light of the appropriate statutory standards. The commission members reported their findings and on April 20, 1984, the governor signed a death warrant setting Ford's execution for the week beginning at noon Friday, May 25, 1984.

Ford's mother, as next friend, then filed a motion in state trial court requesting a stay of execution, a hearing and court appointment of experts to determine Ford's competency to be executed. The motion was denied summarily. After hearing oral argument, the Florida supreme court also denied relief. *Ford v. Wainwright*, 451 So.2d 471 (Fla.1984). The present petition was filed in district court on May 25, 1984. The district court held a hearing on May 29, 1984, heard argument of counsel and concluded the hearing by denying Ford's petition on the alternative grounds of abuse of the writ¹ and the merits. On May 30, 1984, a divided panel of this court granted Ford's application for certificate of probable cause and stayed Ford's execution. *Ford v. Wainwright*, 734 F.2d 538 (11th Cir.) aff'd, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984).

¹ The summary holding of abuse of the writ on the insanity issue is troublesome under the facts presented. In light of our resolution of the merits of this issue, however, it is not necessary that we reach the question.

Ford contends that presently he is insane.² He does not contend that he was insane at the time of the murder, that he was incompetent to stand trial or that he lacked competence to pursue his initial collateral attack. He argues, however, that his mental condition has deteriorated, so that presently he is insane.

Either by statute or case law, states that authorize the death penalty uniformly prohibit the execution of presently insane persons. The origin of the rule is in the common law. Its initial justification is obscure.³ Florida's prohibition is incorporated in *Fla.Stat.* § 922.07 (1983), which prescribes both the test of insanity and the pro-

² As a second claim for relief, Ford restates his contention that Florida administers the death penalty arbitrarily and discriminatorily on the basis of the race of the victim, the race of the defendant and other impermissible factors. With respect to this contention, we conclude that the district court's abuse of the writ holding was clearly correct. In addition, this contention fails on the merits. We do not belabor these conclusions since they have been the subject of expressions of approval by a majority of the justices of the Supreme Court. *Wainwright v. Ford*, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984).

³ Justice Frankfurter and several commentators have discussed the variety of justifications offered for the common law rule. See *Sollesbee v. Balkcom*, 339 U.S. 9, 14-19, 70 S.Ct. 457, 459-62, 94 L.Ed. 604 (1950); Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A.L.Rev. 381, 383-89 (1962); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan.L.Rev. 765, 778-79 (1980); Note, *Insanity of the Condemned*, 88 Yale L.J. 533, 535-37 (1979). The most frequently discussed justifications are: (1) an insane person is incapable of assisting counsel in the fight to keep the sentence from being imposed; (2) the person's insanity is punishment enough; (3) a humanitarian mandate exists which prohibits executing insane persons; (4) the deterrence rationale would not be served by executing the insane because executing an insane individual does not serve as an example to others; (5) retribution is not had by executing the insane because killing one who is insane does not have the same moral quality as killing one who is sane; and (6) a person should not be executed while he is incapable of making peace with his maker. *Id.*

cedure for determining the sanity of a person under a death sentence. The test is whether the prisoner has the mental capacity to understand the nature of the death penalty and the reason it is to be imposed on him. *Fla. Stat.* § 922.07(2) (1983). The statutory procedure requires the governor to appoint a commission of three psychiatrists and to make a determination as to the prisoner's sanity after receiving the commission's report. Ford does not challenge the state's compliance with the statutory procedure.

Ford contends that the prohibition against execution because of insanity is rooted in the eighth amendment. No federal appellate court has so held. There has, however, been considerable comment supportive of his contention.⁴ Prior references in Justice Frankfurter's dissent in *Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S.Ct. 457, 459, 94 L.Ed. 604 (1950), and Justice Harlan's concurring opinion in *Caritativo v. California*, 357 U.S. 549, 550, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958), were to the effect of due process rights on the execution of insane persons. Ford argues, however, that these opinions failed to consider the implication of the eighth amendment because they predated recognition that the eighth amendment is incorporated by the fourteenth as a limitation on the power of the states.⁵ The only substantive difference between Ford's eighth amendment claim and the Florida statute is based on Frankfurter's contention in *Solesbee* that a defendant must be sufficiently competent to cooperate with his attorney in providing reasons why his execution should not be carried out. Since Ford has exhausted both his merits appeal and his collateral attacks, he concedes that this substantive distinction is not material in his case.

⁴ See Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan.L. Rev. 765 (1980); Note, *Insanity of the Condemned*, 88 Yale L.J. 533 (1979).

⁵ See *Robinson v. California*, 370 U.S. 660, 666-67, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

Ford argues, however, that procedural protections comporting to federal due process standards would inexorably follow from recognition of the federal constitutional basis of his substantive right. He contends that the Florida statute, which is essentially an ex parte procedure conducted by the executive, falls short of those due process standards.

If the matter were being presented for the first time, Ford's contention might present considerable difficulty. The panel majority, however, feels that Ford's contention is foreclosed by binding authority. In *Solesbee* the Supreme Court examined a Georgia procedure which was virtually identical to that now incorporated in the Florida statute. In the controlling portion of the opinion the Supreme Court held: "We are unable to say that it offends due process for a state to deem its Governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors." *Solesbee v. Balkcom*, 339 U.S. at 12, 70 S.Ct. at 458 (footnote omitted).

Ford argues that the development of eighth amendment law has so eroded the underpinnings of *Solesbee* that it no longer can be considered as binding authority. That contention is confronted, however, with this court's opinion in *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir.1984), in which we considered an attack on the specific statute now in question and held: "The second claim, the attack on the Florida statute, is made on procedural due process grounds. We hold that the statute meets minimum standards required by procedural due process." *Id.* at 1483. The authority cited in support of that holding was *Solesbee* and *Caritativo*. Under the rule of precedent applicable in this circuit,⁶ the majority regards this holding as binding. Ford contends that his facts are somewhat distinguishable from those in *Goode*, but the statute is precisely the same. Ford contends that the analytical

⁶ See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (1981).

underpinnings of *Solesbee* have been eroded but the facts are indistinguishable from those now before us. Together, our recent reliance on *Solesbee* and our determination that the Florida statute meets minimum standards required by procedural due process is sufficient to require that a panel of this court reject Ford's contention. If our application of *Solesbee* and *Goode* is to be altered, it must be done by the Supreme Court or at least by this court sitting en banc.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

I respectfully dissent. In the law, as in many other disciplines, where one ends up is frequently determined by where one begins. The majority fails to address and decide whether there is a constitutional prohibition against execution of an insane person. The court says that "[n]o federal appellate court has so held." Majority opinion at 4. Before addressing a party's constitutional due process rights, it is necessary to first decide the substantive constitutional right to which he is entitled, if any. Dissenting, Justice Frankfurter challenged the majority of the Court in *Solesbee* to reach the issue, saying:

If the Due Process Clause of the Fourteenth Amendment does not bar the State from infliction of the death sentence while such insanity persists, of course it need make no inquiry into the existence of supervening insanity. If it chooses to make any inquiry it may do so entirely on its own terms. If the Due Process Clause does limit the State's power to execute such an insane person, this Court must assert the supremacy of the Due Process Clause and prohibit its violation by a State.

The Court in an easy, quick way puts crucial problem to one side as not before us. But in determining what procedural safeguards a State must provide, it makes all the difference in the world

whether the United States Constitution places a substantive restriction on the State's power to take the life of an insane man. If not to execute is merely a benevolent withholding of the right to kill, the State may exercise its benevolence as it sees fit. But if Georgia is precluded by the Due Process Clause from executing a man who has temporarily or permanently become insane, it is not a matter of grace to assert that right on behalf of the life about to be taken. If taking life under such circumstances is forbidden by the Constitution, then it is not within the benevolent discretion of Georgia to determine how it will ascertain sanity. Georgia must afford the rudimentary safeguards for establishing the fact. If Georgia denies them she transgresses the substance of the limits that the Constitution places upon her.

Solesbee v. Balkcom, 339 U.S. 9, 15, 70 S.Ct. 457, 460, 94 L.Ed. 604 (1950) (Justice Frankfurter dissenting).

A panel of this court granted Ford's application for a certificate of probable cause and stayed his execution so that this court could fully address Ford's substantial procedural and substantive Eighth and Fourteenth Amendment" claim of right not to be executed while insane. 734 F.2d 538. A majority of the Supreme Court refused the State of Florida's application to vacate this court's stay of execution of sentence of death and explicitly turned its decision on the issue presented by the majority opinion and this dissent. *Wainwright v. Ford*, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984). Justice Powell, the writing Justice, in a footnote stated: "This Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane, and I imply no view as to the merits of this issue." *Id.* 104 S.Ct. at 3498.

Believing that it is necessary that we first resolve whether Ford has a substantive Constitutional claim, this will be considered before analyzing the due process pro-

cedural requirements. Because the majority and I have different starting points, we therefore come to different conclusions. In my view, a proper resolution of the issues in this case must begin with an inquiry into whether there is an Eighth Amendment right not to be executed while insane.

*The Eighth Amendment and the Right Not to be
Executed While Insane*

The Supreme Court has developed a two-part standard for assessing Eighth Amendment claims. This analysis inquires whether a challenged punishment is both acceptable to contemporary standards of decency and comports with the dignity of man. *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (plurality opinion). The contemporary standards of decency test examines the constitutionality of a challenged punishment by referring to domestic public acceptance of that sanction. *Woodson v. North Carolina*, 428 U.S. 280, 288-301, 96 S.Ct. 2978, 2983-2989, 49 L.Ed.2d 944 (1976) (plurality opinion); *Gregg, supra*, 428 U.S. at 176-82, 96 S.Ct. at 2926-29. The human dignity component generally examines whether a punishment is grossly disproportionate because of the severity of the offense and/or is accompanied by the unnecessary infliction of pain. *Gregg, supra*, 428 U.S. at 173, 96 S.Ct. at 2925. The Court has looked primarily to objective evidence such as historical usage in the statutes of the various states to give content to the concepts of decency and dignity. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality opinion); *Gregg, supra*, 428 U.S. at 173, 96 S.Ct. at 2925. However, the Court has also said that it will perform an independent judicial assessment of the constitutionality of the practice in question in addition to relying on the objective evidence. For example, in *Coker v. Georgia, supra*, the Court stated that contemporary public attitudes towards punish-

ing rape by death informed and confirmed its own independent judgment but did not wholly determine the controversy, for "the Constitution contemplates in the end our own judgment will be brought to bear on the question." 433 U.S. at 597, 97 S.Ct. at 2868. The Court in *Coker* held that the death penalty was disproportionate for the crime of rape. An application of the Supreme Court's analysis of Eighth Amendment claims to the issue in question in this case leads to the conclusion that the execution of one who is presently insane would violate the Eighth Amendment.

The History of Executing of Insane

It has been a part of the English common law since the medieval period that the presently incompetent should not be executed. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Mel.U.L.Rev. 434, 466-67 (1964). See also E. Coke, *Third Institute* 4, 6 (London 1797) (1st ed. London 1644); 4 W. Blackstone, *Commentaries* 24.¹ In the United States, early commentary and decisions reflected the same attitude towards the execution of the presently insane. See, e.g., 1 F. Wharton, *A Treatise on the Criminal Law* § 59, at 89 (8th ed. Philadelphia 1880 (1st ed. Philadelphia 1846)); *State v. Vann*, 84 N.C. 722 (1881). State courts have continued to reaffirm the English common law rule of preventing the execution of the presently insane. See, e.g., *Ex Parte Chesser*, 93 Fla. 590, 594, 112 So. 87, 89 (1927); *Hawie v. State*, 121 Miss. 197, 216-18, 83 So. 158, 159, 160 (1919); *In re Grammer*, 104 Neb. 744, 746-49, 178 N.W. 624, 625-26 (1920). Therefore, the English and American common law prevented the execution of the presently insane. At present, virtually all of the states that have the death

¹ For a more detailed analysis of the common law history, see Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan.L.Rev. 765; Note, *Insanity of the Condemned*, 88 Yale L.J. 533 (1979).

penalty have statutes that prohibit executing the insane,² although the procedures for enforcing the legislative mandate of the various jurisdictions varies widely. Regard-

² Twenty-two states have enacted statutory procedures explicitly prohibiting the execution of a prisoner who has been found presently incompetent. Ala.Code § 15-16-23 (1981); Ariz.Rev.Stat.Ann. § 13-4021 *et seq.* (1982); Ark.Stat.Ann. § 43-2622 (1977); Cal.Penal Code § 3700 *et seq.* (1979); Conn.Gen.Stat. § 54-101 (1980); Fla.Stats. § 922.07 (1983); Ga.Code Ann. § 17-10-60 *et seq.* (1982); Ill.Rev.Stat. ch. 38, § 1005-2-3 (1982); Kan.Stat. § 22-4006 (Supp. 1981); Md.Ann.Code art. 27, § 75 (Cum.Supp. 1983); Mass.Gen.Laws Ann. ch. 279, § 62 (Supp. 1984); Miss.Code Ann. § 99-19-57 (Supp. 1983); Mo.Rev.Stat. § 552.060 (Supp. 1983); Mont.Code Ann. § 46-19-201 *et seq.* (1983); Neb.Rev.Stat. § 29-2537 *et seq.* (1979); Nev.Rev.Stat. § 176.425 *et seq.* (1983); N.M.Stat.Ann. § 31-14-4 *et seq.* (1978); N.Y.Correc.Law § 655 *et seq.* (Supp. 1983); Ohio Rev.Code Ann. § 2949.28 *et seq.* (Supp. 1982); Okla.Stat.Ann. title 22, § 1004 *et seq.* (1983); Utah Code Ann. § 77-19-13 (1982); Wyo.Stat. § 7-13-901 *et seq.* (Cum.Supp. 1984).

Five states which authorize capital punishment have adopted statutes requiring the transfer of any mentally disordered prisoner to a state mental hospital. *See* 11 Del.Code Ann. § 406 (1982); Ind.Code Ann. § 11-10-4-1 *et seq.* (1983); N.C.Gen.Stat. § 15A-1001 (1983); S.C. Code Ann. § 44-23-210 *et seq.* (Supp. 1983); Va. Code § 19.2-177 (1983).

Except in cases involving a woman supposedly pregnant, only the governor can reprieve a death sentence in Idaho. Idaho Code § 19-2708 (1979). But Idaho adopts the common law absent a specific statutory provision, *id.* § 73-116 (1973), and the common law prohibits the execution of the presently incompetent. Therefore, the Idaho statute should apply for the presently incompetent.

Four states have statutes that grant the governor, or some other authority discretion to stay the execution of the presently incompetent. *See* Ark.Stat.Ann. § 43-2622 (1977); Ga.Code Ann. § 27-2602 (1978); Mass.Ann.Laws ch. 279, § 48 (Michie/Law.Co-op 1963); N.H.Rev.Stat.Ann. § 4-24 (1970).

Four states have adopted, by case law, the common law rule prohibiting the execution of the presently incompetent. *State v. Allen*, 204 La. 513, 516, 15 So.2d 870, 871 (1943); *Commonwealth v. Moon*, 383 Pa. 18, 22-23, 117 A.2d 96, 99, 100 (1955); *Jordan v. State*, 124 Tenn. 81, 90-91, 135 S.W. 327, 329-30 (1911); *State v. Davis*, 6 Wash.2d 696, 717, 108 P.2d 641, 651 (1940) (dictum).

less, the objective criteria both historical and present are uniform in their rejection of the penalty of death for the presently insane. Contemporary standards of decency clearly indicate the execution of an insane person would violate the Eighth Amendment.

The question of whether the execution of the insane would be in conflict with the dignity of man, the basic concept underlying the Eighth Amendment, *Gregg, supra*, 428 U.S. at 173, 96 S.Ct. at 2925, is closely linked to an assessment of the contemporary standards of decency. 428 U.S. at 175, 96 S.Ct. at 2926. However, an independent assessment of such a practice leads to the same conclusion. It is a basic tenet in our society that true mental illness is not a voluntary disease that can be controlled. To execute one who is insane is to extinguish the life of a person in a completely helpless condition. This person cannot truly understand what is about to happen to him, cannot assist an attorney in any viable legal issue that may still be present in his case, cannot adequately prepare for imminent death, or depending on the particular person and his religion, make his peace with God. The execution of an insane person will not further the penalogical justifications for capital sentencing, deterrence and/or retribution.

Retribution is generally perceived as "an expression of society's moral outrage." *Gregg*, 428 U.S. at 183, 96 S.Ct. at 2929. However, the social goal of retribution is frustrated when the power of the State is exercised against one who does not comprehend its significance. See Note, *Incompetency to Stand Trial*, 81 Harv.L.Rev. 454, 458-59 (1967); *Musselwhite v. State*, 215 Miss. 363, 60 So.2d 807 (1952).³

³ "Amid the darken midst of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if you were taken to the electric chair, he would not quail or take account of its significance." *Id.* 60 So.2d at 809. See also Note, *Insanity of the Condemned*, 88 Yale L.J. 533, 536 n. 17 (1979) (execution of the presently insane is executing a person who for all moral purposes is not the same person who committed the crime).

Furthermore, deterrence is not served by the execution of the mentally incompetent. Prospective offenders of capital crime would not identify with an insane person who is executed. As one commentator said: "[H]ow could the execution of a man incapable of understanding any law, operate more as a warning to others to avoid the violation of the law, than the public punishment of a dog? The one would be a spectacle of horror, the other of ridicule." Collinson, *A Treatise on Law Concerning Idiots, Lunatics, and Other Persons Non Compos Mentis* 472 (1812).

Therefore, a view of the historical and objective evidence as well as an independent judicial assessment of the execution of the presently insane leads to the conclusion that such an act violates both contemporary standards of decency and the basic dignity of man. Therefore, there is an Eighth Amendment right not to be executed while presently insane.

Further support for this conclusion regarding the Eighth Amendment is found in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637. The Supreme Court said that there can be no doubt that the Bill of Rights guaranteed at least the liberties and privileges that Englishmen had at the time the Bill of Rights was adopted. The Court went on to say:

When the framers of the Eighth Amendment adopted the language of the English Bill of Rights, . . . one of the consistent themes of the era was that Americans had all of the rights of English subjects Thus, our Bill of Rights was designed in part to insure that these rights were preserved. Although the framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

103 S.Ct. at 3007, n. 10. The framers of the Bill of Rights were familiar with the English common law. As stated earlier in this opinion, the execution of the insane was seen as cruel and unusual punishment in England at the time of the adoption of the Eighth Amendment. Therefore, even under a strict view of the Eighth Amendment, *i.e.* that a punishment is cruel and unusual only if it is similar to punishments considered cruel and unusual at the time the Bill of Rights was adopted, *Furman v. Georgia*, 408 U.S. 238, 264, 92 S.Ct. 2726, 2739, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), the execution of the insane is prohibited. At the time the Bill of Rights was adopted, the execution of the insane was clearly perceived to be a different kind of punishment than was the execution of one who is not insane. Therefore, as a first principle, it is unequivocally established that there is a constitutional right not to be executed while insane. The question then becomes whether Florida's procedures are adequate to protect this Eighth Amendment right.

The Procedural Requirements Stemming from the Eighth Amendment Right Not to be Executed While Insane

The State of Florida has created an administrative proceeding in which the governor determines whether an individual under sentence of death is competent to be executed. F.S.A. § 922.07 (1983). That proceeding essentially provides little due process rights for the individual. When the governor is informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person "to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." F.S.A. § 922.07(1). The examination is to take place with all three psychiatrists present at the same time. Defense counsel and the prosecutor may be present at the examination and if the prisoner sen-

tenced to death has no counsel the trial court shall appoint counsel to represent him. *Id.* However, no hearing is held and no provision is made for advocacy. The present governor has a publicly announced policy of "excluding all advocacy on the part of the condemned from the process of determining whether a person under sentence of death is insane."⁴ After receiving the psychiatrists' report, the governor makes a decision. If the governor decides that the convicted person does not meet the prescribed competency test, then he orders the person committed to the state hospital. If he decides that the person is sane, then the governor issues the death warrant ordering execution. F.S.A. § 922.07(2) and (3). There are no written findings and there is no judicial review of the decision. The Florida Supreme Court held in this case that "the statutory procedure is now the exclusive procedure for determining competency to be executed." *Ford v. Wainwright*, 451 So.2d 471, 475 (Fla.1984). The issue of sanity cannot be raised independently in the state judicial system. *Id.*

This procedure does not adequately protect a person's Eighth Amendment right not to be executed while insane. The fact that we are considering a federal constitutionally protected right (rather than a state created right which may be afforded some due process protections⁵) requires more process than the Florida procedure gives. Because of the qualitative difference of the death penalty, the Supreme Court has articulated a procedural component to the Eighth Amendment. In this vein, the Court has been chiefly concerned "with the procedure by which the state imposes the death sentence" *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3451, 77 L.Ed.2d 1171 (1983). The qualitative difference of the death penalty requires a "corresponding difference in the need for reliability in the determination that death is the ap-

⁴ *Goode v. Wainwright*, 448 So.2d 999 (Fla. 1984).

⁵ See discussion, *supra*, pages 528-529.

appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Just last term, the Court stated, "We reaffirm our commitment to the demands of reliability in decisions involving death . . ." *Spaziano v. Florida*, — U.S. —, —, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340, 349 (1984). Florida's procedures do not comport with the procedural component of the Eighth Amendment's standards for reliability.

Admittedly, we are not reviewing here the question of whether death is the appropriate punishment for Mr. Ford and the procedures used to make that decision. Nevertheless, the procedure used to determine whether the death penalty is a permissible punishment for him at this time is being reviewed. The reliability required for capital decisions is still relevant and adequate procedures to determine his *present* death eligibility are still required. We have not held in any case that a substantive constitutional right is adequately protected by an administrative ex parte hearing conducted by the executive branch of state government. It is the role of the courts, both state and federal, as the expositors of the dimensions of constitutional rights to make this decision. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

A judicial hearing is required in order to provide the "adversarial debate our system recognizes as essential for the truth seeking function." *Gardner v. Florida*, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). It is a fundamental tenet of our judicial system and, therefore, our system for protecting constitutional rights, that there is "no better instrument . . . for arriving at truth." *Joint Anti-Fascist Refugee Commission v. McGrath*, 341 U.S. 123, 171, 71 S.Ct. 624, 648, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). Adversary hearings serve as an institutional check on arbitrary and impermissible action and no other procedure effectively

fosters the same belief that one has been dealt with fairly even if there remains a disagreement with the result. *Gray Panthers v. Schweiker*, 652 F.2d 146, 162 (D.C.Cir. 1980). The Florida procedure is totally lacking in due process protection. There is no room for advocacy,⁶ no written findings, and no judicial review. The executive branch of state government which prosecuted the defendant makes an unreviewable decision as to whether he receives the protection of the constitutional right not to be executed if insane. Therefore, there are no protections against erroneous or arbitrary decisions as to the person's competency.

The conclusion that the Florida procedure is inadequate is supported by the Supreme Court's habeas corpus decisions. In *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the Court addressed the situation of whether it was mandatory to hold an evidentiary hearing on constitutional claims presented in habeas corpus actions. The Court said: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in his state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has, after a full hearing, reliably found the relevant facts." 372 U.S. at 312, 83 S.Ct. at 756. See also *Thomas v. Zant*, 697 F.2d 977, 980-81 (11th Cir.1983). The Court in *Townsend* then set out categories of cases where a hearing must be held. These categories focus upon the reliability of the state court proceedings to vindicate the constitutional right. *Townsend, supra*, 372 U.S. at 313, 83 S.Ct. at 757. These categories were enacted in the federal habeas corpus statute, 28 U.S.C. § 2254(d), where Congress defined the situations in which state court

⁶ The petitioner cannot call witnesses, cross-examine the doctors who render the decision, or present argument on his behalf.

fact-findings are entitled to a "presumption of correctness by the federal courts." Again, the focus is on reliability. *Townsend* thus sets forth the threshold standards of determining whether a hearing must be held and whether § 2254(d) governs the state decision. See *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir.1981) (en banc).

Section 2254(d) assumes that there will be findings made by a state court. In this case, there was no hearing and thus no court determination. Furthermore, § 2254(d)(1) provides that federal courts will not defer to state fact-finding if the merits were not resolved in the state court hearing. Subsection (2) of § 2254(d) precludes giving deference to a fact-finding procedure employed by the state which was not adequate to afford a full and fair hearing. Subsection (3) of the same statutory section precludes deference if the material facts were not adequately developed at the state court hearing. Finally, subsection (6) requires that no deference be accorded if the petitioner did not receive a full, fair and adequate hearing in the state court proceeding. The facts as to Ford's sanity are in sharp dispute and have never been reached or resolved by a hearing in the state court or otherwise. As we said in our previous decision in this case, "credible evidence . . . indicates that Ford is insane." *Ford v. Strickland*, 734 F.2d 538, 539 (11th Cir. 1984).

Contrary to the holding of the majority, Ford's crimes are not foreclosed by *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); *Caritativo v. California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958), or, *Goode v. Wainwright*, 731 F.2d 1482 (11th Cir.1984). In none of these three cases did the Court reach a judicial determination that a person has a constitutional right not to be executed when insane. The majority opinion and the dissent concur that no federal appellate court has decided this issue.

Solesbee and *Caritativo* were decided before the Eighth Amendment was applied to the states through the Due Process Clause of the Fourteenth Amendment. The

Eighth Amendment was incorporated in the case of *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 728 (1962). Additionally, those two cases were decided before the Supreme Court drastically altered the constitutional framework in which a citizen in this country can be executed.⁷ Therefore, they are inapplicable in deciding what the Eighth Amendment requires procedurally before a person who maintains that he is incompetent can be executed.

A certificate of probable cause was denied in *Goode* because "[a]ssuming that there is such a right [not to be executed when insane], we agree with the district court that petitioner is barred from raising it in this case because of abuse of the writ." *Goode v. Wainwright*, 731 F.2d 1482, 1483 (11th Cir.1984) (citations omitted). The denial of a certificate is a holding that the appeal is frivolous and is a decision by the court that it will not consider the case on its merits. *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

The majority thus errs in relying upon an opinion that did not consider on their merits the issues considered herein. The decision of this court to deny Goode's certificate for probable cause was appealed to the Supreme Court which summarily refused to stay the execution. *Goode v. Wainwright*, — U.S. —, 104 S.Ct. 1721, 80 L.Ed.2d 192 (1984) (unpublished order denying certiorari). Both courts decided the case on April 4, 1984.

⁷ See *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), as well as the above discussion. At the time *Solesbee* and *Caritativo* were decided, there was nothing constitutionally impermissible with "committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases." *McGautha v. California*, 402 U.S. 183, 207, 91 S.Ct. 1454, 1467, 28 L.Ed.2d 711 (1971). *McGautha*, like *Solesbee* and *Caritativo*, was decided on the basis of the Fourteenth Amendment and not on Eighth Amendment grounds. In *Furman* and *Gregg*, the Court recognized and began to explicate the Eighth Amendment parameters of capital sentencing.

The present case has a different history. The panel of this court granted the certificate of probable cause on May 30, 1984, because there was no abuse of the writ. The execution was stayed to permit decision of the important issue. As stated previously, the Supreme Court refused to vacate our stay. *Wainwright v. Ford*, — U.S. —, 104 S.Ct. 3498, 82 L.Ed.2d 911, and Justice Powell noted that this issue has not been decided by the Supreme Court *Supra*, 104 S.Ct. at 3498.

It is apparent that the Supreme Court considered that *Goode* was decided on the issue of abuse of the writ and that it was presented the issue of whether our court erred in denying the certificate of probable cause. It is just as apparent that the Supreme Court refused to vacate the May 30, 1984, stay of execution so that this court could consider the important issues of whether a person sentenced to die has the right not to be executed if he is insane, and if he has that right, whether he is entitled to a due process hearing to make the determination of this factual issue.

The district court should be reversed and the case remanded for an evidentiary hearing pursuant to 28 U.S.C. § 2254(d) to determine whether Ford is insane.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5372

ALVIN BERNARD FORD, or CONNIE FORD, individually,
and acting as next friend on behalf of
ALVIN BERNARD FORD, PETITIONERS-APPELLANTS

versus

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida, RESPONDENT-APPELLEE

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion January 17, 1985, 11 Cir., 198—, — F.2d —).
(June 3, 1985)

Before VANCE and CLARK, Circuit Judges, and STAFFORD *, District Judge.

* Hon. William H. Stafford, Jr., U.S. District Judge for the Northern District of Florida, sitting by designation.

PER CURIAM:

* * * *

(X) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]

United States Circuit Judge

[Section 922.07, *Florida Statutes* (1983), as amended (1985)]

922.07 Proceedings when person under sentence of death appears to be insane.—

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

History.—s. 268, ch. 19554, 1939; CGL 1940 Supp. 8663 (278); s. 134, ch. 70-339.

CHAPTER 85-193

Senate Bill No. 1185

An act relating to executions; amending s. 922.07, F.S.; directing the Governor to have certain condemned persons committed to the Department of Corrections Mental Health Treatment Facility; directing the facility administrator to notify the Governor of certain findings; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (3) and (4) of section 922.07, Florida Statutes, are amended to read:

922.07 Proceedings when person under sentence of death appears to be insane.—

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane.]

(4) When a person under sentence of death has been committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane,] he shall be kept there until the *facility administrator* [proper official of the hospital] determines that he has been restored to sanity. The *facility administrator* hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor June 18, 1985.

Filed in Office of Secretary of State June 18, 1985.

CODING: Words in [Bracketed Type] are deletions from existing law; words in [Italicized Type] are additions.

SUPREME COURT OF THE UNITED STATES

No. 85-5542

ALVIN BERNARD FORD, ETC., PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections

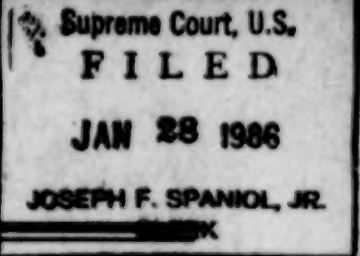
ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 9, 1985

No. 85-5542

(8)



IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend on behalf of
ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment forbids the execution of a condemned person who is incompetent at the time of execution?

2. Whether Florida's state-law prohibition against executing the incompetent has created an entitlement to be spared from execution when incompetent, that, under the Fourteenth Amendment, cannot be withdrawn without a full and fair adversarial hearing?

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CITATION TO OPINIONS BELOW

The order of the District Court denying habeas corpus relief is unreported. JA 158. The opinion of the Court of Appeals granting a stay of execution is reported as *Ford v. Strickland*, 734 F.2d 538 (11th Cir. 1984). JA 166. The opinion of the Court of Appeals on the merits is reported as *Ford v. Wainwright*, 752 F.2d 526 (11th Cir. 1985), and is set out at JA 183. The summary order denying rehearing is reported at 765 F.2d 154, and is set out at JA 202.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on January 17, 1985, and petitioner's timely petition for rehearing was denied on June 3, 1985. Thereafter, this Court entered an order extending the time within which the petition for writ of certiorari could be filed to and including October 1, 1985. The petition was filed on October 1, 1985 and certiorari was granted on December 9, 1985. JA 207. Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, the text of which is set out in Appendix A hereto. It also involves Section 922.07, *Florida Statutes* (1983), which is also set forth in Appendix A.

STATEMENT OF THE CASE

Alvin Bernard Ford was convicted and sentenced to death by the State of Florida. The validity of his conviction and death sentence has previously been litigated, *see Ford v. Strickland*, 696 F.2d 804 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983), and is not at issue in these proceedings. The present proceeding is concerned solely with the constitutionality of Florida's effort to execute Mr. Ford despite substantial evidence of his current incompetency.

In early 1982, during the pendency of Mr. Ford's appeal from the denial of his first habeas corpus petition, gradual changes began to appear in Mr. Ford's behavior. JA 17-34 (habeas corpus allegations). The changes had begun only as occasional peculiar ideas and misperceptions. However, as they became more frequent and noticeable, counsel for Mr. Ford asked a psychiatrist, Dr. Jamal Amin, to continue seeing Mr. Ford and to recommend any treatment he deemed appropriate.¹ By June, 1983, Dr. Amin concluded that Mr. Ford was suffering from paranoid schizophrenia and recommended that he be treated with psychotropic medication. JA 88-92.² No treatment was provided by respondent, however. Mr. Ford continued to deteriorate thereafter, until reaching a point where counsel believed him to be incompetent, no longer able to communicate.

As a result, on October 20, 1983, counsel for Mr. Ford invoked the procedures of *Fla. Stat.* § 922.07 (1983), relating to the competency of a condemned inmate. Pursuant to this statute, the Florida governor appointed a commission of three psychiatrists to evaluate Mr. Ford's current sanity. The commission members each reported their conflicting findings separately to the Governor in writing. The governor's decision was not announced until April 30, 1984, when, without further proceedings and without any explicit resolution of these conflicts, he signed a death warrant ordering Mr. Ford's execution. JA 12.

On May 21, 1984, Mr. Ford's attorneys filed in the state trial court a "Motion for a Hearing and Appointment of Experts for

¹ Dr. Amin had first evaluated Mr. Ford in July, 1981, in connection with Florida's clemency procedure. JA 87.

² This was to be Dr. Amin's last direct contact with Mr. Ford, since Mr. Ford came to view him as a part of a "conspiracy" against him and refused to see him. JA 63 (habeas corpus allegations). Thus, Dr. Amin was unable to assess Mr. Ford's competency after June, 1983. Counsel, believing that a psychiatrist other than Dr. Amin was therefore necessary, asked Dr. Harold Kaufman to review Mr. Ford's condition. JA 63. Prior to evaluating Mr. Ford, Dr. Kaufman reviewed Mr. Ford's correspondence, audio tapes of interviews conducted by counsel, prior evaluations and case records. JA 63-64.

Determination of Competency to be Executed, and for a Stay of Execution During the Pendency Thereof," together with a supporting memorandum of law and an extensive appendix containing documentation of Mr. Ford's incompetency. R 1219-82. The trial court denied the motion without a hearing and without findings. JA 4. On appeal, the Florida Supreme Court also denied relief. It held that the governor, pursuant to *Fla. Stat.* § 922.07, provides the only remedy for the condemned in Florida who are incompetent at the time of execution and that the courts have no power to review the governor's determination of competency to be executed. *Ford v. State*, 451 So.2d 471, 475 (Fla. 1984); JA 9-10.

Thereafter, counsel for Mr. Ford filed a habeas corpus petition in the United States District Court for the Southern District of Florida, claiming *inter alia* that the Constitution prohibited his execution if presently incompetent and accordingly, entitled him to an evidentiary hearing to determine his competency.

In support of this request, counsel proffered extensive documentation of Mr. Ford's mental illness, consisting of Mr. Ford's correspondence during the course of his illness, a report concerning the psychiatric interviews and evaluations by Dr. Amin, and transcripts of interviews between Mr. Ford and his counsel. JA 17-77 (habeas corpus allegations); R 183-489 (documentation filed as appendix to petition for writ of habeas corpus).³ It showed a progressive deterioration of Mr. Ford's mental and emotional health from December, 1981, forward. It further showed that by June, 1983, Dr. Amin had concluded that Mr. Ford was suffering from paranoid schizophrenia. JA 91.

Counsel's proffer also included psychiatric opinions respecting Mr. Ford's competency. Four psychiatrists had been asked to evaluate Mr. Ford's competency in November and December of 1983—one (Dr. Kaufman) at the request of counsel for Mr.

³ The documentation filed in the District Court was the same as had been submitted to the state courts.

Ford, JA 93-97, and three (Dr. Mhatre, Dr. Afield, and Dr. Ivory) by appointment of the Florida governor pursuant to *Fla. Stat.* § 922.07. JA 98-106. Two others recognized for their expertise in forensic psychiatry, Dr. Halleck and Dr. Barnard, were asked to review only the process by which the psychiatrists appointed by the governor had evaluated Mr. Ford. JA 109-24. The opinions of the four evaluating psychiatrists were nearly unanimous that Mr. Ford was psychotic but were sharply divergent concerning his competency to be executed in light of his psychosis.

Dr. Kaufman and two of the governor's psychiatrists, Dr. Mhatre and Dr. Afield, confirmed Dr. Anin's previous diagnosis that Mr. Ford was suffering from paranoid schizophrenia or an equally profound form of psychosis. JA 96, 103-104, 105.⁴ Only Dr. Ivory disagreed, finding a "severe adaptational disorder" but not psychosis. JA 99. However, Dr. Halleck explained

⁴ A typical example of Mr. Ford's mental state, demonstrating many of the hallmarks of psychosis, see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 188-90 (3d ed. 1980), was recorded by Dr. Kaufman during his interview with Mr. Ford on November 3, 1983:

The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch . . . there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me—Sinatra, Hugh Hefner, people from the dog show, Richard Burr, my sisters and brother trying to sign the death warrants so they don't keep bothering me . . . I never see them, I only hear them especially at night. (Note that Mr. Ford denies *seeing* these people in his delusions. This suggests that he is honestly reporting what his mental processes are.) I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley) . . . you can't evaluate me. I did a study in the army . . . a lot of masturbation . . . I lost a lot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to—Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other counties and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

JA 94-95 (comments in parentheses are those of Dr. Kaufman).

that Dr. Ivory's finding was unreliable because of his apparent failure to consider data crucial to an accurate diagnosis: "the history and previous evaluation of Mr. Ford's condition." JA 113. Dr. Barnard agreed with Dr. Halleck and further concluded that Dr. Ivory's crucial inferential finding, that Mr. Ford was feigning psychosis because his cell was far better organized than his thought processes seemed to be, JA 100, had no basis in the medical literature. JA 120-21.

Despite agreement that Mr. Ford was deeply psychotic, Dr. Kaufman, Dr. Mhatre, and Dr. Afield disagreed concerning his competency to be executed. Dr. Kaufman concluded that Mr. Ford was incompetent and fully documented the facts, as well as the reasoning, that led to this conclusion. JA 93-97.⁵ Although Dr. Mhatre and Dr. Afield concluded that Mr. Ford was then competent⁶ under the statutory standard, JA 103, 105-06,⁷ neither explained that conclusion in light of his agree-

⁵ Dr. Kaufman noted and explained his conclusion as follows:

It is my conclusion, using the Florida statutory standard you have supplied me with, that because of his psychiatric illness, while he does understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the governor and control him, President Reagan's interference in the execution process, etc.

JA 96.

⁶ Dr. Mhatre, though opining that Mr. Ford was competent in December, 1983, predicted that without antipsychotic treatment, Mr. Ford "is likely to deteriorate and may soon reach a point where he may not be competent for execution." JA 103-04. This prediction of deterioration was confirmed by the supplementary examination by Dr. Kaufman conducted on May 23, 1984 at the request of Mr. Ford's counsel. Dr. Kaufman found that his condition had "seriously deteriorated since November 3, 1983 . . . so that he now has at best only minimal contact with the external world." JA 108. He again concluded that Mr. Ford was incompetent under the Florida statutory standard. JA 108.

⁷ Florida's standard of competency at execution is whether the condemned prisoner "understands the nature and effect of the death penalty and why it is to be imposed upon him." *Fla. Stat.* § 922.07(1).

ment with Dr. Kaufman's clinical findings that Mr. Ford was *psychotic*. On the basis of the clinical features of Mr. Ford's psychosis, Dr. Kaufman had concluded that Mr. Ford was incompetent because "his ability to reason [was] occluded, disorganized and confused when thinking about his possible execution"; he was unable to make a connection between the homicide he committed and the death penalty; and, because of his bizarre thought processes, he sincerely believed that he was not going to be executed. JA 96 (opinion of Dr. Kaufman). Yet, Dr. Mhatre and Dr. Afield made no effort to explain how they could agree with Dr. Kaufman's clinical findings and still conclude that Mr. Ford was competent. JA 103, 105-06.⁸ In the opinions of Dr. Halleck and Dr. Barnard, Dr. Mhatre's and Dr. Afield's conclusions as to Mr. Ford's competency were unreliable, because the process by which they reasoned from clinical data to psychiatric/legal conclusion was unexplained and apparently unsupportable. JA 112-14, 121-22.

Notwithstanding this proffer, on May 29, 1984, the district court denied the petition without a hearing. It ruled on alternative grounds that Mr. Ford had abused the writ or that Florida's compliance with § 922.07 adequately protected Mr. Ford's constitutional right, if any, to be spared from execution when incompetent. JA 164.

On May 30, 1984, the court of appeals granted a certificate of probable cause and stayed Mr. Ford's execution. *Ford v. Strickland*, 734 F.2d 538 (11th Cir. 1984); JA 166. This Court thereafter denied respondent's motion to vacate the stay. *Wainwright v. Ford*, ____ U.S. ____, 104 S.Ct. 3498 (1984); JA 180. A divided panel of the court of appeals then affirmed the denial of Mr. Ford's claim on the merits. *Ford v. Wainwright*, 752 F.2d 526 (11th Cir. 1985); JA 183. Rehearing and rehearing en banc were denied. JA 202.

SUMMARY OF ARGUMENT

1. No court has yet decided whether the Eighth Amendment prohibits execution of the presently incompetent. The

⁸ Dr. Ivory also concluded, consistent with his clinical impression that Mr. Ford was not psychotic, that Mr. Ford was competent. JA 100.

question is now before this Court. Under either of the Eighth Amendment analyses utilized by the Court, execution of the presently incompetent is forbidden. Competency to be executed is, accordingly, a matter to be determined in federal habeas corpus proceedings.

Even if the Framers of the Eighth Amendment intended to prohibit only those punishments that were considered cruel and unusual by the common law at the time it was adopted, *Solem v. Helm*, 463 U.S. 277, 285-86 (1983), execution of the incompetent was prohibited by the Eighth Amendment. From the thirteenth century on, the common law strictly prohibited execution of the incompetent as "savage" and as an act of "extreme inhumanity and cruelty." E. Coke, *Third Institute* 6 (1644). This aspect of the common law prohibition of cruel and unusual punishment was quite clearly carried forward in the founding of our Nation. 1 J. Chitty, *A Practical Treatise on the Criminal Law* 620 (Amer. ed. 1819).

If the scope of the Eighth Amendment's prohibition was intended to evolve along with the concept of human dignity, *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Gregg v. Georgia*, 428 U.S. 153, 171-73 (1976), the Amendment likewise prohibits execution of the incompetent, for such executions are not in accord with contemporary views of "the dignity of man." *Id.* at 173. The objective indicia of human dignity, *Enmund v. Florida*, 458 U.S. 782, 788-89 (1982), uniformly proscribe execution of the incompetent. Independent judicial evaluation is in agreement with the objective indicia, for execution of the incompetent makes no measurable contribution to the penological justifications for the death penalty, inflicts excessive suffering, and interferes with the right of access to the courts.

Since the Eighth Amendment prohibits execution of the incompetent, Mr. Ford has a right to have his competency determined in a federal habeas corpus proceeding. Because the only state determination of his competency was nonjudicial and was accomplished without a hearing of any kind, he is entitled

to have that determination made on the basis of a hearing in federal court. *Townsend v. Sain*, 372 U.S. 293 (1963).

2. Apart from the Eighth Amendment prohibition against executing the incompetent, the Fourteenth Amendment requires a procedurally fair determination of competency under Florida's state-created right to be spared from execution when incompetent. The resolution of this question is not controlled by *Solesbee v. Balkcom*, 339 U.S. 9 (1950). *Solesbee* was decided at a time when due process analysis still turned on the right-privilege distinction, when sentencing proceedings were beyond the reach of the Due Process Clause, and well before the Due Process Clause required enhanced due process protection in death penalty cases. Thus, *Solesbee* can no longer be relied upon to resolve either the applicability of the Due Process Clause, or the extent of due process required, in the determination of competency under a state-created right to be spared from execution if incompetent. Application of modern due process principles reveals that Mr. Ford has a state-created entitlement to be spared from execution when incompetent, which cannot be withdrawn without substantially greater procedural protections than are afforded by *Fla. Stat.* § 922.07.

ARGUMENT

I.

THE EIGHTH AMENDMENT PROHIBITS EXECUTION OF THE PRESENTLY INCOMPETENT

On five previous occasions, between 1897 and 1958, the Court has had before it various questions regarding the execution of a condemned prisoner who is incompetent at the time of execution. In each of those cases the Court considered the questions only as a matter of due process,⁹ since the Eighth

⁹ *Nobles v. Georgia*, 168 U.S. 398 (1897) (no right to jury for determining competency to be executed); *Phyle v. Duffy*, 334 U.S. 431 (1948) (no need to decide due process question because state judicial remedy still available); *Solesbee v. Balkcom*, 339 U.S. 9 (1950) (reaching due process question and holding that the Due Process Clause does not govern); *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568-69 (1953) (no issue to decide since judicial determination of competency "provide[d] full protection against the execution of the insane"); *Caritativo v. California*, 357 U.S. 549 (1958) (one sentence opinion citing *Solesbee*, with four justices separately opining that the Due Process Clause prohibited execution of the presently incompetent).

Amendment had not yet been incorporated into the Due Process Clause. See *Robinson v. California*, 370 U.S. 660 (1962). Nevertheless, the court below held that one of those cases, *Solesbee v. Balkcom*, 339 U.S. 9 (1950), also controlled Mr. Ford's claim that the Eighth Amendment prohibits execution of the presently incompetent. As Mr. Ford demonstrates herein, the Eighth Amendment does preclude the execution of the presently incompetent. As a result, he is entitled to an evidentiary hearing to show that he is presently incompetent. And because there has been no fair and reliable state determination of his competency, he is entitled to that hearing in the federal habeas court. See *Townsend v. Sain*, 372 U.S. 293 (1963); *Vasquez v. Hillery*, ____ U.S. ____, 106 S.Ct. 617, 621-22 (1986); *id.* at 625 (O'Connor, J., concurring).

A. The Court Below Erred In Holding That *Solesbee* Controlled The Resolution Of The Eighth Amendment Claim.

In plain terms, *Solesbee* decided only whether the Due Process Clause, as then interpreted, was offended by "the method applied by Georgia here to determine the sanity of an already convicted defendant. . . ." 339 U.S. at 11. It did not decide the substantive issue of whether the Constitution prohibited execution of the presently incompetent. When *Solesbee* was decided in 1950, the Eighth Amendment's prohibition against cruel and unusual punishment was not to be incorporated into the Due Process Clause for another twelve years. *Robinson v. California*, *supra*. Similarly, the procedural rights guaranteed by the Due Process Clause did not apply to sentencing proceedings. See *Williams v. New York*, 337 U.S. 241, 245-46 (1949). Accordingly, the *Solesbee* Court held that the Due Process Clause did not apply to the procedures by which sanity was determined *after* conviction and sentencing. 339 U.S. at 12.

That *Solesbee*, in 1950, did not decide the Eighth Amendment issue is even clearer in light of the direct evolution brought about by the incorporation of the Eighth Amendment into the Fourteenth Amendment. The Constitution for the first time began to limit the states' power to punish—both as to sentencing procedures and as to sentences themselves. As a

result, the Court expressly recognized that its earlier precedents upholding state capital procedures against due process challenges required reconsideration and often a contrary result when the same procedures were challenged under the Eighth Amendment's requirement that there be greater reliability and fairness in capital sentencing determinations. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 355-58 (1977) (plurality opinion); *id.* at 363-64 (White, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 597-99 (1978) (plurality opinion of Burger, C.J.) ("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* [v. *California*, 402 U.S. 183 (1971)] became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman* [v. *Georgia*, 408 U.S. 238 (1972)]"). Thus, various procedures that otherwise comport with the Fourteenth Amendment have been held not to satisfy the Eighth Amendment. *See, e.g., Beck v. Alabama*, 447 U.S. 625 (1980) (failure to permit consideration of lesser offenses); *Gardner v. Florida*, *supra* (use of confidential information in sentencing).

For these reasons, until the court of appeals rendered its anomalous decision in Mr. Ford's case, every lower federal court confronted with the same issue had held, as the eleventh circuit itself had held in *Goode v. Wainwright*, that "[t]here has been no conclusive determination whether there is such a constitutional entitlement [not to be executed if incompetent] under federal law." 731 F.2d 1482, 1483 (11th Cir. 1984) (citing *Gray v. Lucas*, 710 F.2d 1048, 1053-54 (5th Cir. 1983)). *Accord Ford v. Strickland*, 734 F.2d at 539 (granting stay of execution); JA 167. Thus, when Justice Powell wrote for the plurality, in upholding Mr. Ford's stay, that "[t]his Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane," *Wainwright v. Ford*, 104 S.Ct. at 3498 n.*; JA 181, he was demonstrably correct.

The question is now before the Court. And as Mr. Ford demonstrates, under either of the Eighth Amendment analyses that have been utilized by the Court—the intent of the Framers or the evolving standards of decency—execution of the presently incompetent is forbidden.

B. The Intent of the Framers Was That The Presently Incompetent Be Spared From Execution

One of the two primary modes of analysis used for determining whether a particular punishment violates the Eighth Amendment is to determine the intent of the Framers of the Bill of Rights. That intent included the centuries-old prohibition on executing the incompetent.

It is now a settled principle of Eighth Amendment jurisprudence that, at the very least, the "cruel and unusual punishments" clause was adopted to protect American citizens from punishments which were considered unnecessarily cruel, torturous, or barbarous by English law at the time the Eighth Amendment was adopted. *Solem v. Helm*, 463 U.S. 277, 285-86 (1983); *id.* at 312-13 (Burger, C.J., joined by White, Rehnquist, and O'Connor, J.J., dissenting). Thus, Thomas Cooley, though finding it "certainly difficult to determine precisely what is meant by cruel and unusual punishments," believed that only punishments permitted under common law at the time of the adoption of the amendment would be permitted by the Eighth Amendment. T. Cooley, *A Treatise on the Constitutional Limitations* 472-73 (7th ed. 1903). Concurring in *Furman*, Justice Brennan summarized the Court's early Eighth Amendment decisions as "concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted." *Furman v. Georgia*, 408 U.S. at 264 (Brennan, J., concurring). *Accord McGautha v. California*, 402 U.S. at 226 (Black, J., concurring).¹⁰ Accordingly, whether the Framers intended that the Eighth Amendment protect the incompetent from

¹⁰ The "intent of the Framers" in adopting the Eighth Amendment is not, therefore, the "elusive quarry" that it has been with respect to, for example, the Sixth Amendment. *Cf. Williams v. Florida*, 399 U.S. 78, 92-93, 99 (1970). In contrast, the Framers clearly intended to equate the constitutional prohibition against cruel and unusual punishments with the common law prohibition; even though they "may have intended the Eighth Amendment to go beyond the scope of its English counterpart," *Solem v. Helm*, 463 U.S. at 286, "their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection. . . ." *Id.*

execution depends in turn upon the view taken by the common law of the execution of the incompetent.¹¹

At common law execution of the incompetent was prohibited as a "savage and inhuman" act, 4 W. Blackstone, *Commentaries on the Law of England* 24 (1768), and "a miserable spectacle . . . of extreme inhumanity and cruelty," E. Coke, *Third Institute* 6 (1644). When the Eighth Amendment was framed, this prohibition was considered an "ancient" rule, dating from at least the thirteenth or early fourteenth century. 2 J. Stephen, *A History of the Criminal Law of England* 151 (1883) (citing the written laws of Edward II (1307-26) and Edward III (1326-77)).¹²

Further, the rule was unequivocal and universal in its application. This is best demonstrated by the reaction of the commentators to Henry VIII's attempt in the sixteenth century to establish a narrow exception to the rule for one convicted of "high treason." See 1 W. Hawkins, *A Treatise on the Pleas of the Crown* 2 (1716); Blackstone, at 24. Even this limited attempt to circumvent the prohibition against executing the incompetent was short-lived, for it was repealed within a few years of its enactment. *Id.*¹³ With one voice, the commen-

¹¹ The Framers of the Bill of Rights were, of course, familiar with the common law for that was the only system they had known: "The common law was the mapped world; to depart therefrom was to venture into the unknown." R. Berger, *Death Penalties* 63 (1982).

¹² See also N. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* 159 (1969) (tracing the treatment of insanity prior to Edward II); Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1931-32) (citing Fitzherbert, *Natura Brevium* 202 (1534)); S. Glueck, *Mental Disorder and the Criminal Law* 124-25 (1925). Accord Royal Commission on Capital Punishment, *1949-1953 Report* 13 (1953).

¹³ The treason exception was repealed during the reign of Mary. Mary was Mary I, whom history has labeled as "Bloody Mary." She ruled from 1553 to 1558 and during her reign she procured "ferocious new treason laws," G.R. Elton, *England Under the Tudors* 219 (1960), punishable by "such pains of death as befits treason, stat. I, c.6." Mary's repeal of the "cruel and inhuman law" of Henry VIII was thus not motivated by benevolence, but by the overwhelming commitment of the common law to the prohibition against executing the incompetent.

tators sharply rebuked this effort to create an exception to the rule that for centuries had been so well-settled. Coke spoke for all the commentators when he wrote that this "cruel and inhuman law . . . was against the common law," which considered the execution of a "mad man . . . a miserable spectacle, both against law and of extreme inhumanity and cruelty. . . ." Coke, at 6. *Accord* Blackstone, at 24; 1 M. Hale, *History of the Pleas of the Crown* 35 (1736); Hawkins, at 2.

The history of Henry VIII's attempt to establish an exception to this rule reveals one other aspect of the rule that is material to the inquiry herein. To use the terms of current jurisprudence, the common law prohibition against execution of the incompetent gave rise to an "entitlement" to a reprieve rather than to a "mere hope," see *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7-11 (1979), to be spared from execution. Writing in the first half of the eighteenth century, Hale explained that there were three kinds of reprieves, or stays of judgment or execution. The first two were discretionary: *ex mandato regis* (at king's command) and *ex arbitrio judicis* (at the judge's discretion). The third, however, was mandatory: *ex necessitate legis* (out of the necessity of law). See generally Hale, at ch. 57. The stay due to incompetency fell into this third category. Otherwise Henry VIII would have had no need to enact a new law in order to establish his exception to the rule forbidding execution of the incompetent. See 1 N. Walker, *Crime and Insanity in England* 196 (1968) ("that Henry VIII found it necessary to legislate before he could [execute an incompetent person] is almost conclusive evidence that it was *ex necessitate legis* . . ."). *Accord* Blackstone, at 394-97 (stays due to incompetency were *ex necessitate legis*); Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melb. U.L. Rev. 434, 441 (1964) ("in the case of a convicted prisoner becoming *non compos* after judgment the judge was bound *ex necessitate legis* to grant a reprieve").

Although the rule prohibiting the execution of the presently incompetent was firmly entrenched, universally applied, and

indeed mandatory in the common law, the commentators emphasized different reasons for the rule. No less than five rationales were advanced. Coke explained it on grounds of fundamental humanity and decency: "[W]hen a mad man is executed, . . . [it is] a miserable spectacle, both against law and of extreme inhumanity and cruelty. . . ." Coke, at 6. *Accord* Blackstone, at 24; Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 State Trials 474, 477 (Howell ed. 1816), (republished from, 3 State-Tryals 651 (1719). Hale explained that execution of the incompetent was unfair because of the inability of such persons to defend themselves as the law might still allow: "[W]ere [the incompetent] of sound memory, he might allege somewhat in stay of judgment or execution." Hale, at 35. *Accord* Blackstone, at 395-96; Hawles, at 476.¹⁴ Hawles explained that the rule existed as well to enable the condemned to prepare for death: "[I]t is inconsistent with religion, as being against christian charity to send a great offender, as it is stiled, into another world, when he is not of a capacity to fit himself for it." *Id.* at 477. Coke provided a fourth rationale: that execution of the incompetent could not deter others from committing homicide since it "can be no example to others." Coke, at 6. Finally, Blackstone explained, the incompetent are not executed, for "*furiosus solo furore punitor*"—madness is punishment in itself. Blackstone, at 395-96. *See also* Hale, at 37. Notwithstanding these differing explanations for the common law rule, there was no disagreement concerning the rule: "[W]hatever the reason of the law is, it is plain that the law is so." Hawles, at 477.

Given the clarity and vitality of the common law rule prohibiting execution of the incompetent, the Framers undoubtedly intended that the Eighth Amendment incorporate this rule. There is not the slightest evidence that the Framers

¹⁴ Hawles explained that incompetency at execution could prevent the condemned from asserting "circumstances lying in his private knowledge, which would prove his innocenc[e], of which he can have no advantage, because not known to the persons who shall take upon them his defense. . . ." *Id.*

intended that execution of the incompetent be excepted from the punishments deemed cruel and unusual at the time the Eighth Amendment was adopted. To reach this conclusion, one would have to assume that the Framers intended "American law [to be] more brutal than what is revealed as the unbroken command of English law for centuries preceding the separation of the colonies." *Solesbee v. Balkcom*, 339 U.S. at 20 (Frankfurter, J., dissenting). As to the execution of the incompetent particularly, there is no basis for such an assumption. See, e.g., 1 J. Chitty, *A Practical Treatise on the Criminal Law* 620 (Amer. ed. 1819) (carrying forward the proscription on execution of the incompetent, noting that it "was always thought cruel and inhuman"); 1 W. Russell, *A Treatise on Crimes and Indictable Misdemeanors* 15 (3d Amer. ed. 1836) (same); F. Wharton, *A Treatise on the Criminal Law of the United States* 50 (2d ed. 1852) (same). As described by a twentieth century historian, when the Eighth Amendment was enacted,

Both humanity and the law assumed, of course, that no truly insane person should be put to death as punishment for his criminal acts. Though opposition to capital punishment as such was comparatively small, only a few self-consciously ruthless intellectuals even suggested that insane criminals should suffer the maximum penalty.

C. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry in the Gilded Age* 66 (1968). Accordingly, when a legislative committee in Massachusetts wrote in 1836 about the prospect of executing an incompetent person, it spoke for the nation when it said, "[T]he proposition to do so would be rejected with unanimous indignation, even after he has committed more than one murder." Mass. Comm. on Capital Punishment, *Report* 22 (1836).¹⁵

¹⁵ The Massachusetts' committee was one of several 19th-century state commissions investigating the death penalty which all endorsed the same view regarding the unthinkability of execution of the incompetent. See Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan. L. Rev. 765, 779 & n.67 (1980).

In sum, the Framers sought at a minimum to secure the common standards of decency then in effect: They did not seek regression from those standards. Execution of the incompetent thus falls under the proscription of cruel punishments originally intended by the Framers.

C. Evolving Standards Of Decency Demand That The Incompetent Be Spared From Execution

In determining whether a particular punishment falls within the prohibition of the Eighth Amendment, the Court has not confined its analysis solely to whether the Framers intended to prohibit that form of punishment. "Instead, the Amendment has been interpreted in a flexible and dynamic manner." *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (plurality opinion). The Eighth Amendment "is not fastened to the obsolete," *Weems v. United States*, 217 U.S. 349, 378 (1910), but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

The analysis of a particular punishment in light of "evolving standards of decency" involves two inquiries. First, the Court assesses contemporary standards of decency by focusing upon "objective indicia that reflect the public attitude toward a given sanction," *Gregg v. Georgia*, 428 U.S. at 173, including "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made." *Enmund v. Florida*, 458 U.S. 782, 788 (1982). Second, "informed by [these] objective factors to the maximum possible extent," *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court "bring[s] its own judgment to bear on the matter," *Enmund v. Florida*, 458 U.S. at 788-89, in order to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment." *Gregg v. Georgia*, 428 U.S. at 182.

Whether measured against the objective contemporary standards of decency or evaluated independently in light of

these standards, execution of the incompetent is as intolerable now as it was at the time the Eighth Amendment was adopted.

1. Contemporary standards of decency uniformly disapprove execution of the incompetent

The evaluation of contemporary standards of decency is not difficult, for the standards have remained constant for the greater part of the millennium. From the perspective of historical development, the common law has uniformly prohibited execution of the incompetent for seven hundred years. From the perspective of legislative judgment, no state which has capital punishment allows execution of the incompetent.¹⁶

This uncommonly uniform evidence of domestic rejection is further reflected in international practice. United Nations reports reveal that the prohibition is virtually universal. All reporting countries with capital punishment laws exclude the mentally incompetent from execution. Department of Economic and Social Affairs, United Nations Doc. ST/SOA/SD/10, *Capital Punishment: Developments 1961-1965* 10 (1967); Department of Economic and Social Affairs, United Nations, Doc. ST/SOA/SD/9, *Capital Punishment* 15-16, 88 (1962).

The universal repudiation of the execution of the incompetent should thus lead the Court, as no other "contemporary standards" analysis has, to the conclusion that such executions

¹⁶ In Appendix B to this brief, the relevant statutory and case law provisions of these states are set out for the Court's review. As the Court can see, all but four states expressly prohibit execution of the incompetent. The remaining four states do not expressly permit execution of the incompetent—they simply have no law on the matter. State court decisions have continued to reaffirm the prohibition against executing the presently incompetent. See, e.g., *Ex Parte Chessier*, 93 Fla. 590, 112 So. 87, 89 (1927); *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927); *State v. Allen*, 204 La. 513, 15 So.2d 870, 871 (1943); *Howie v. State*, 121 Miss. 197, 83 So. 158, 159-60 (1919); *Barker v. State*, 75 Neb. 289, 106 N.W. 450 (1905); *In re Smith*, 25 N.M. 48, 176 P. 819, 822 (1918).

are forbidden by the Eighth Amendment.¹⁷ A number of logical explanations have been advanced over the years to explain the prohibition against executing the incompetent, *see* p. 14, *supra*, some of which have been criticized as unpersuasive in contemporary society. *See, e.g.,* Hazard and Louisell, *Death, The State, and The Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 383-89 (1962). Nevertheless, execution of the incompetent has been prohibited and disapproved as savage, cruel and inhuman for centuries, and it still is today. The "miserable spectacle" of execution of the incompetent should thus be rejected as readily as any other "barbaric" punishment would be rejected today.

Such doctrines [that would permit execution of the incompetent] have been preached and practiced in National-Socialist Germany, but they are *repugnant to the moral traditions of Western civilization* and we are confident that they would be unhesitatingly rejected by the great majority of the population of this country. We assume the continuance of the ancient and humane principle that has long formed part of our common law.

Royal Commission on Capital Punishment, *1949-1953 Report* 98 (1953) (emphasis supplied). If objective standards of morality and human decency are the test, there could be no better evidence of those standards than the long-standing and continued repudiation of execution of the incompetent by Anglo-American jurisprudence.

2. Execution of the incompetent offends the concept of human dignity underlying the Eighth Amendment

The uniquely uniform objective indicia "weigh heavily" in the analysis of the constitutionality of executing the incompetent, *see Enmund v. Florida*, 458 U.S. at 797, and, as in *Enmund*

¹⁷ Even where contemporary standards of decency have not been as uniform as they are here, the Court has nonetheless allowed such standards to "weigh heavily in the balance" when it makes the ultimate judgment concerning the compatibility of a particular application of the death penalty with the Eighth Amendment. *Enmund v. Florida*, 458 U.S. at 789-97; *Coker v. Georgia*, 433 U.S. at 592-96, 597.

and *Coker*, should inform the Court's independent judgment that execution of the incompetent does not comport with "the basic concept of human dignity at the core of the [Eighth] Amendment." *Gregg v. Georgia*, 428 U.S. at 182.¹⁸ There are, however, three additional factors which compel the conclusion that execution of the incompetent is in fundamental conflict with our society's evolving view of human dignity.

First, execution of the incompetent is "excessive" under the analysis articulated in *Gregg* and followed in *Coker* and *Enmund*, because it does not "measurably contribute[]," *Enmund*, 458 U.S. at 798, to either of the principal social purposes of the death penalty. Second, execution of the incompetent inflicts suffering beyond that which is necessarily involved in the execution of a competent person. And finally, execution of the incompetent may interfere with the condemned person's right of meaningful access to collateral remedies.

Execution of the incompetent does not accord with human dignity, because to "accord with 'the dignity of man,'" a punishment "[can]not be 'excessive.'" *Gregg v. Georgia*, 428 U.S. at 173. This principle requires that the state have "penological justification" for inflicting a punishment. *Id.* at 183. With respect to the death penalty, the execution of an individual offender must, therefore, serve at least one of "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Id.*¹⁹

¹⁸ The Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual judges; judgment should be informed by objective factors to the maximum extent possible." *Coker v. Georgia*, 433 U.S. at 592.

¹⁹ One other social purpose of the death penalty has been noted by the Court: "the incapacitation of dangerous criminals." *Id.* at 183 n.28. While incapacitation may be "a legitimate consideration in a capital sentencing proceeding," *Spaziano v. Florida*, ____ U.S. ____, 104 S.Ct. 3154, 3163 (1984), it "has never been embraced as a sufficient justification of the death penalty." *Id.* This is so because incapacitation simply means removal from society, "safe-keeping." Hazard and Louisell, *Death, the State, and the Insane: Stay of Execution*, at 389 n.24. And as observed in relation to the incompetent condemned person, "[T]he prisoner is for all practical purposes as fully incapacitated in a mental hospital as he is in death." *Id.*

Unless the death penalty when applied to one in [petitioner's] position *measurably contributes* to one or both of these goals, it is "nothing more than the purposeless and needless imposition of pain and suffering". . . .

Enmund v. Florida, 458 U.S. at 798 (quoting *Coker v. Georgia*, 433 U.S. at 592) (emphasis supplied). Execution of the incompetent is "excessive" under this analysis, because it does not "measurably contribute" to the goals of retribution or deterrence.

Retribution has been understood as "an expression of society's moral outrage at particularly offensive conduct." *Gregg v. Georgia*, 428 U.S. at 183 (citing H. Packer, *Limits of the Criminal Sanction* 43-44 (1968)). For society's moral outrage to be satisfied through the carrying out of punishment, the offender must be perceived as receiving the punishment he or she "deserves." *Furman v. Georgia*, 408 U.S. at 308 (Stewart, J., concurring). See also Royal Commission on Capital Punishment, *Minutes of Evidence*, Dec. 1, 1949 207 (1950) (quoted in *Gregg v. Georgia*, 428 U.S. at 183 n.30). The punitive act can be what is fully deserved, however, only if the offender is able to comprehend its significance. "To give someone her just deserts implies her recognition that those deserts are just." Gale, *Retribution, Punishment, and Death*, 18 U.C.D. L. Rev. 973, 1031 (1985).²⁰ In the death penalty context, the condemned must be able to understand, first, that he is being put to death, and second, that he is being put to death because he killed.

Against this background, execution of the incompetent quite clearly makes no measurable contribution to the retributive purpose of the death sentence. Society's need for the condemned to recognize that her suffering is deserved because of

²⁰ Retribution is thus significantly different from "vengeance" or "retaliation," neither of which would be concerned with the offender's ability to understand the connection between the offense and the punishment. See Hazard and Louisell, at 386. The Court has never approved vengeance as a penological justification for the death penalty. Thus, retribution retains its character as a sufficient social purpose only if it retains its distinction from vengeance.

her prior misconduct cannot be satisfied by execution of the incompetent:

[W]e consider it both wrong and useless to punish those, such as the insane, who lack the capacity for that recognition. The prevailing consensus, that it is unjust to execute the insane even though they may have been sane when their crimes were committed and otherwise deserve execution, may stem from a partial if largely unconscious acknowledgement that it is important for the offender to realize that punishment is the effect of crime.

Gale, 18 U.C.D. L. Rev. at 1031-32 (footnote omitted).²¹ Thus, "the societal goal of institutionalized retribution may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance." Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458-59 (1967). When applied to a person in Mr. Ford's condition, the death penalty does *not* therefore, "measurably contribute[]," *Enmund v. Florida*, 458 U.S. at 798, to the goal of retribution and may even defeat it.

Similarly, execution of the incompetent makes no measurable contribution to the deterrence of others. Assuming, as the Court did in *Gregg*, "that there are murderers . . . for whom the threat of death . . . undoubtedly is a significant deterrent," 428 U.S. at 185-86, the deterrent effect of the death penalty upon such people is neither strengthened by execution of the incompetent, nor weakened by refusal to execute the incompetent. As Hazard and Louisell have explained, this is so because "the offender cannot, at the time he is about to commit the crime, foresee that after capture, conviction and sentence, he

²¹ Indeed, this commentator opines that the inability to exact retribution on an incompetent prisoner may be the *primary* reason that we forbid his or her execution: "that we believe punishment appeals, whether successfully or not, to the offender's consciousness and conscience—may help explain our moral distaste for killing those who cannot understand either what we are doing or why we are doing it." *Id.* at n.167.

will become insane" and thus fortuitously avoid the death sentence. *Id.* at 385.²²

For these reasons, execution of the incompetent makes no measurable contribution to the goal of deterrence. "[I]t does not materially dilute the deterrent effect of the death penalty to withhold it if the prisoner becomes insane [,] . . . [and] there is no deterrent effect in executing him" Hazard and Louisell, at 385. Accordingly, "[t]he reason for withholding the ultimate sanction from the insane prisoner is that his execution is *unnecessary* to the accomplishment of the end of deterrence." *Id.* at 386 (emphasis supplied). Plainly, execution of the incompetent makes no measurable contribution to the goal of deterrence.

The second reason that execution of the incompetent does not accord with human dignity is that it inflicts suffering beyond that which is necessarily involved in the execution of a competent person. In holding that capital punishment is not *per se* cruel and unusual, the Court has concluded that even though there is pain inflicted in the course of an execution, "the necessary suffering involved in any method employed to extinguish life humanely" does not render capital punishment cruel and unusual. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). At the same time, the Court has recognized that the Constitution cannot tolerate "the infliction of *unnecessary* pain in the execution of the death sentence." *Id.* at 463 (emphasis supplied). Admittedly, in *Francis* the Court was considering *methods* of execution that, "inherent in the

²² The unforeseeability of mental illness is, for these purposes, no different from the unforeseeability of physical illness, for mental illness is no more the product of the human will than is physical illness. This is particularly so with schizophrenia, the illness suffered by Mr. Ford, for

[s]chizophrenia is a brain disease, now definitely known to be such. It is a real scientific and biological entity as clearly as diabetes, multiple sclerosis, and cancer are scientific and biological entities. It exhibits symptoms of a brain disease, symptoms which include impairment of thinking, delusions, hallucinations, changes in emotions, and changes in behavior. And, like cancer, it probably has more than one cause.

E. Torrey, *Surviving Schizophrenia* 2 (1983).

method," inflicted suffering beyond that "necessar[ily] . . . involved" in the methods of execution "employed to extinguish life humanely." *Id.* at 464. The principle involved—that it is cruel to inflict more pain and suffering than the norm requires—is nonetheless helpful in assessing whether execution of the incompetent is in keeping with human dignity, for execution of the incompetent does inflict suffering *beyond* that which is necessarily inflicted in the execution of a competent person.

Through the work of scholars who have studied the process of dying, it is now known that those who know they are facing imminent death experience common psychological "stages": first denial, then anger, and then depression. However, the dying often "work through" these stages, by taking care of "unfinished business" and by mourning the impending loss of all that is known to be meaningful. Through this process people are able to die with dignity: at peace and in a stage of acceptance. See, e.g., E. Kubler-Ross, *On Death and Dying* (1969); O. Brim, H. Freeman, S. Levine, and N. Scotch, eds., *The Dying Patient* (1970); S. Stephens, *Death Comes Home* (1973); R. Williams, *To Live and to Die—When, Why, and How* (1973); E. Kubler-Ross, *Questions and Answers on Death and Dying* (1974). The suffering and anguish of those who know they are facing death is thus ameliorated by this universal psychological process.

This suffering is not ameliorated, however, in the life of the person who becomes incompetent prior to execution, for he has lost the capacity to experience the normal psychological processes associated with dying. This loss is strikingly revealed in Mr. Ford's case, for his incompetency is due to schizophrenia. Characterized as "the most tragic chronic disease remaining in twentieth-century western civilization," E. Torrey, *Surviving Schizophrenia* at 4, "[s]chizophrenia" is a cruel and discordant term, just like the disease it signifies," *id.* at 1, for it thoroughly undermines a person's ability to perceive accurately and to understand what is happening in his or her life.

Schizophrenia is marked by delusions, hallucinations, and disorders of thought; it attacks the will, clarity of

thinking, the emotions—in short, those mental processes that differentiate us from the other organisms in our environment. . . . The schizophrenic is often frightened of the world around him or her. Things and people appear menacing. The world is confusing and unpredictable. Eventually, the schizophrenic's terror, coupled with an inability to direct and control his or her own thought processes, brings about an abrupt withdrawal from society. This withdrawal, while it may temporarily ease the schizophrenic's sense of threat from the environment, only serves to deepen the isolation and loneliness.

R. Restak, *The Brain* 273-74, 276 (1984).

When a person in this condition must face death, he is denied access to the process that leads to dying with peace and in a stage of acceptance: in short, he is denied the opportunity to die with dignity. Unable to sort out the reasons that he will be killed, to reflect upon his life in an attempt to find meaning in it,²³ to identify the "loose ends" or unfinished business of his life (much less to attend to those matters), or to engage in the crucial process of making peace with God, the schizophrenic person is without the normal human tools necessary to prepare for and accept death. The schizophrenic who faces execution faces the terror of death without the capacity that the competent person has to understand his life and to make peace with his life and his death.

Mr. Ford, for example, "has at best only minimal contact with the events of the external world." JA 109 (supplemental report of Dr. Kaufman). "His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide

²³ As Dr. Kubler-Ross recounts, toward the end,

Many of my dying patients have relived experiences from their past life. I think this is a period of time when the patient has switched off all external input, when he begins to wean off, when he becomes very introspective, when he tries to remember incidents and people important to him, and when he ruminates once more about his past life in an attempt to, perhaps, summarize the value of his life and to search for meaning.

E. Kubler-Ross, *Questions and Answers on Death and Dying* at 35.

he committed and the death penalty." JA 96 (report of Dr. Kaufman). Further, Mr. Ford's world is filled with terrifying people and events that we can neither know nor understand. His "delusional thinking . . . represents a desperate attempt to regain control because he is strictly confined and feels harassed, powerless, and increasingly fragmented." JA 91 (report of Dr. Amin). In this condition the terror inherent in facing execution will be many times amplified for Mr. Ford by the terror and confusion produced by his illness. He experiences the terror but is denied the ameliorative effects of understanding.

The additional suffering—beyond the norm for execution—that Mr. Ford must experience is analogous to the additional suffering experienced by a person who is treated with a therapy causing painful side effects but who cannot understand why the treatment is necessary. Such a situation was addressed in *Superintendent of Belchertown School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977), where the court held that the guardian of a profoundly retarded man could properly decide not to permit radical chemotherapy treatments for the man's terminal illness. In approving the guardian's exercise of judgment, the court reasoned

"If he is treated with toxic drugs he will be involuntarily immersed in a state of painful suffering, the reason for which he will never understand. Patients who request treatment know the risks involved and can appreciate the painful side-effects when they arrive. They know the reason for the pain and their hope makes it tolerable." . . . Saikewicz would have no comprehension of the reasons for the severe disruption of his formerly secure and stable environment occasioned by the chemotherapy. *He therefore would experience fear without the understanding from which other patients draw strength.*

373 Mass. at 750, 754, 370 N.E.2d at 430, 432 (emphasis supplied).

Similarly, because the incompetent face execution without the ameliorative effects of understanding, execution of the incompetent inflicts suffering beyond that involved in the

humane extinguishment of life. As already noted, the common law commentators understood this added suffering though they expressed it in the intellectual context of their times.²⁴ There can be little doubt that this awareness informed the universal condemnation of such executions as "a miserable spectacle . . . of extreme inhumanity and cruelty." The standard of decency that accords with human dignity should be no less today.

Finally, execution of the incompetent is in discord with our society's evolving standards of decency because execution of the incompetent may interfere with the condemned's right of meaningful access to collateral remedies—a right of "fundamental importance . . . in our constitutional scheme," *Johnson v. Avery*, 393 U.S. 483, 485 (1969), that is protected by the Constitution. *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Just as a person must be competent in order to make the myriad of decisions, voluntarily and intelligently, that must be made at trial, a person must be competent in order to exercise meaningfully his right of access to collateral remedies. Unlike appeals, which concern claims already litigated, collateral proceedings are "original actions seeking new trials . . . frequently rais[ing] heretofore unlitigated issues" *Id.* at 827-28. Accordingly, like trials, collateral proceedings require the condemned to be competent—to have the capacity to disclose relevant facts that are known only to him and to make rational and intelligent decisions concerning the issues in the proceeding. *Cf. Dusky v. United States*, 362 U.S. 402 (1960). This requirement is most apparent if the collateral proceeding involves a claim of ineffective assistance of counsel for failure to investigate, but it is present whenever the historical facts

²⁴ See Hawles, *Remarks on the Trial of Mr. Charles Bateman* at 477. ("[I]t is inconsistent with religion, as being against christian charity to send a great offender, as it is stiled, into another world, when he is not of a capacity to fit himself for it").

underlying a constitutional claim are uniquely within the prisoner's knowledge.²⁵

Thus, the state's execution of an *incompetent* prisoner may amount to a denial of access to the courts. In capital cases, wholly unlike non-capital cases, the execution of the sentence absolutely denies further access to the courts. *Cf. Lockett v. Ohio*, 438 U.S. 586, 605 (1978). From the perspective of the constitutional guarantee of the right of access to the courts, therefore, execution should be permitted only if the purpose of the guarantee—"to enable those unlawfully incarcerated to obtain their freedom," *Johnson v. Avery*, 393 U.S. at 485, or to enable those unlawfully sentenced to death to regain their lives—has been served. Concededly, this requires

. . . a practical judgment whether in the particular situation "the legal issues have been sufficiently litigated and relitigated that the law must be allowed to run its course"; and whether the criminal defendant's entitlement to "all the protections which . . . surround him under our system prior to conviction and during trial and appellate review" [emphasis mine] have been accorded.

Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980) (Phillips, J.) (bracketed material and emphasis in text) (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (Rehnquist, J., Circuit Justice)). See also *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). Where the legal issues have not been "sufficiently litigated," our evolving standards of decency require that the execution be stayed, for "were [the condemned] of sound memory, he might allege somewhat in stay of judgment or execution." Hale, *History of the Pleas of the Crown* at 35.²⁶

²⁵ See *Shriner v. Wainwright*, 735 F.2d 1236, 1240-41 (11th Cir.), cert. denied, ____ U.S. ____, 82 L.Ed.2d 852 (1984) (a habeas corpus petitioner will be held to have waived his right to present facts and claims if he personally fails to assert such facts and claims as were known to him at the time of the habeas corpus proceeding, upon counsel's negligent or deliberate failure to assert such facts and claims on his behalf).

²⁶ Mr. Ford's case may be one in which meaningful access to collateral remedies has not been denied by his incompetency, for he proceeded through

For these reasons, the Court's judgment should confirm the objective indicia of contemporary standards, with a determination that execution of the incompetent violates the Eighth Amendment.

D. Florida's Statutory Competency-Determination Procedure Fails To Provide The Reliable Fact-Finding Procedure Required By The Eighth Amendment's Prohibition Against Execution Of The Incompetent.

Since the Eighth Amendment provides a substantive right to Mr. Ford not to be executed while incompetent, Florida's attempt to execute him while he is incompetent—like any other violation of rights guaranteed by the Bill of Rights—presents a federal question. It requires that the federal habeas corpus court hear and determine independently the factual question of whether Mr. Ford is incompetent, in the same manner and for the same reason that it would determine, for example, the voluntariness of a confession or mental competence during trial.

Though the federal courts decide such federal questions, as a matter of federal law and comity the habeas court need not hold an evidentiary hearing if the state courts have provided a full and fair hearing on the federal question, *e.g.*, *Townsend v. Sain*, *supra*, and must presume state court findings of historical fact to be correct if there was such a full and fair determination, 28 U.S.C. § 2254(d). In this case, however, the Florida state courts have eschewed their ability to determine whether Mr. Ford is presently incompetent, JA 10, and have thus left resolution of the federal question to a purely executive, *ex parte* proceeding that permits no evidentiary hearing and is entirely non-adversarial. Since the Florida state determination was nonjudicial, hence entitled to no deference under section 2254, and was procedurally defective in addition, the federal

an initial state post-conviction proceeding and an initial federal habeas proceeding in the district court before becoming incompetent. However, that this rationale may not be applicable in Mr. Ford's particular circumstances in no way detracts from its persuasiveness in establishing that execution of the incompetent violates the Eighth Amendment.

habeas corpus court must hear and determine independently the factual question of whether Mr. Ford is incompetent. The district court did not hold such a hearing on Mr. Ford's documented allegations of incompetency, for it believed that Mr. Ford's constitutional rights, if any, were adequately protected by Florida's executive procedure for the determination of competency. JA 164.²⁷ This case must be remanded with instructions to hold that hearing.

1. The *ex parte*, non-adversarial Florida procedure

By statute, Florida has created an executive procedure through which the governor determines a death-sentenced individual's competency to be executed. *Fla. Stat.* § 922.07 (1983). In Mr. Ford's case, for the first time, the Supreme Court of Florida held that "the statutory procedure is now the exclusive procedure for determining competency to be executed." *Ford v. Wainwright*, 451 So.2d at 475; JA 10.²⁸

²⁷ In addition to its ruling on the merits, the district court stated alternatively that Mr. Ford had abused the writ because his petition was not filed earlier. JA 160-64. In view of its ruling on the merits, the court of appeals did not directly reach the question though the majority did opine that the district court's "summary holding of abuse of the writ . . . is troublesome under the facts presented." JA 184 n.1. The stay panel had previously rejected the district court's finding. JA 167-69. Under the facts of this case, abuse of the writ is wholly inappropriate. In sum, the facts of record show: (a) that Mr. Ford was *competent* when his first petition was filed and decided; (b) that behavioral changes began to occur during the time Mr. Ford's appeal was pending from the denial of that petition and Mr. Ford's counsel engaged a psychiatrist to recommend treatment; (c) that treatment was not forthcoming at the prison and Mr. Ford subsequently became incompetent; (d) that counsel immediately pursued available state remedies on behalf of Mr. Ford; (e) that Mr. Ford pursued his state remedies for six months thereafter and exhausted those remedies only when the governor announced a competency decision by signing a death warrant; and (f) that Mr. Ford was in court asserting the claim of incompetency within a few days after his warrant was signed. There was no abuse.

²⁸ The Florida Court had previously held, prior to the enactment of the statute, that there was a right to a judicial determination by the trial judge where a condemned person was alleged to be incompetent. *Ex Parte Chessier*, 93 Fla. 291, 111 So. 720 (1927); *Hysler v. State*, 136 Fla. 563, 187 So. 261 (1939). The court had not had an opportunity to address the effect of § 922.07

This procedure is *ex parte* within the executive branch. When the governor is informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person "to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." § 922.07(1). The examination is to take place with all three psychiatrists present at the same time. *Id.* Defense counsel and the prosecutor "may be present at the examination," *id.*, but counsel is not allowed to participate in or interfere with the examination.²⁹ If the convicted person has no counsel, the trial court "shall appoint counsel to represent him." *Id.*

Though provision is made for appointment of counsel, no provision is made for a hearing or for any other process through which counsel can advocate the interests of her client. Consistent with these provisions, the present Florida governor has a "publicly announced policy of *excluding all advocacy on the part of the condemned* from the process of determining whether a person under a sentence of death is insane." *Goode v. Wainwright*, 448 So.2d at 1001 (emphasis supplied).³⁰

After receiving the reports of the three appointed psychiatrists, the governor simply "decides" whether the condemned meets the competency test set out in the statute. §§ 922.07(2), (3). There is no hearing or any other procedure for resolving conflicts or through which the condemned or her representa-

on this right, however, until 1984, in Mr. Ford's case and in *Goode v. Wainwright*, 448 So.2d 999 (Fla. 1984). In *Goode*, decided one month before Mr. Ford's case, the court appeared to leave open the prospect of judicial proceedings for the determination of execution competency. See *Goode v. Wainwright*, 731 F.2d at 1483 ("he was free to assert this contention in *state* and federal courts from the time that he was sentenced to death" (emphasis supplied)).

²⁹ Thus, in ordering Mr. Ford's examination, Governor Graham provided that "Counsel for the inmate and the State Attorney may be present but *shall not participate in the examination in any adversarial manner.*" Executive Order No. 83-197, issued December 9, 1983 (emphasis added).

³⁰ That the present Florida governor could make such a policy, demonstrates in a clear fashion, the opportunity for caprice in the Florida process.

tive can advocate or challenge the appointed psychiatrists' reports. If the governor decides that the condemned person is not competent, he orders the person committed to the state hospital. § 922.07(3). If he decides that he is competent, the governor issues a death warrant ordering execution. § 922.07(2). There are no written findings and there is no review of the governor's decision.

2. The Florida procedure is inadequate to enforce the Eighth Amendment right

In order to vindicate federal rights, habeas corpus depends critically upon accurate and reliable fact-finding. If the facts have been reliably found by the state courts on the basis of a full hearing, the federal habeas court must presume that the findings are correct and is not required to hold a new fact-finding proceeding. However, if there has been no fact-finding by the state courts or if the fact-finding is unreliable, the federal habeas court *must* hold a *de novo* evidentiary hearing. *Townsend v. Sain*, 372 U.S. at 312. Thus, the Eighth Amendment prohibition of the execution of the incompetent, requires that the federal habeas court hear and determine independently the factual questions underlying a petitioner's competency, "unless the state-court trier of fact has after a full hearing reliably found the facts." *Id.*³¹

As we have shown, however, in Mr. Ford's case the state determination was nonjudicial and further, was the result of a defective procedure, since neither the governor, the state courts, nor the district court held an evidentiary hearing. There was only an *ex parte* § 922.07 proceeding. *Townsend* and its statutory counterpart, 28 U.S.C. § 2254(d), have always required that a "State court of competent jurisdiction," § 2254(d) (emphasis supplied), find the facts if the facts are to be presumed correct. 372 U.S. at 312-13. Since no state court has

³¹ As the Court made clear in *Maggio v. Fulford*, 462 U.S. 111 (1983), resolution of the facts underlying a competency claim may, like any other factual matter, be determined in the state courts, subject to the provisions of *Townsend v. Sain* and 28 U.S.C. § 2254(d).

ever considered whether Mr. Ford was competent, the need for a federal evidentiary hearing is manifest. Nevertheless, even if a non-judicial state trier of fact could make reliable fact-findings entitled to deference under 28 U.S.C. § 2254(d), the governor acting under § 922.07 cannot. There was no hearing, much less a full and fair hearing, to serve as a basis for fact-finding. *Cf. Townsend*, 372 U.S. at 313; 28 U.S.C. § 2254(d)(1), (2). There were no findings of fact, except for those implied in the finding that Mr. Ford was competent by virtue of his death warrant having been signed. *Cf. Townsend*, 372 U.S. at 312; 28 U.S.C. § 2254(d). Further, any implied findings of fact were erroneous, because there were "found" under Florida's, rather than the Eighth Amendment's, standard of competency. *Cf. Townsend*, 372 U.S. at 314-15. Finally, the absence of judicial fact-finding was not cured by judicial review, for there was no judicial review of the governor's implied fact-finding or his fact-finding procedure; nor can there be under the Florida Supreme Court's decision in Mr. Ford's case.³²

While these defects in the § 922.07 proceeding, without further discussion, clearly compel a *de novo* hearing in the district court, it is worth emphasizing why this is so. The *Townsend* Court's requirement of fact-finding on the basis of a full and fair hearing—as the only acceptable means of assuring reliable fact-finding—is well-rooted in the Court's jurisprudence, both before and after the *Townsend* decision. The Court has long recognized that a hearing is necessary to provide the "adversarial debate our system recognizes as essential to the truth seeking function," *Gardner v. Florida*, 430 U.S. at 359, for "no better instrument has been devised for arriving at the truth," *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). See also *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975); *Fuentes v. Shevin*, 407 U.S.

³² *Cf. Mattheson v. King*, 751 F.2d 1432, 1447 (5th Cir. 1985) (deferring to state court's determination of competency following an evidentiary hearing, though not deciding whether the Constitution prohibits execution of the mentally incompetent).

67, 80 (1972); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

There is no more compelling example of the crucial role of the adversarial hearing in the truth seeking function than in the resolution of mental health issues. As the Chief Justice has observed, "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979).³³ It is this very reason that "justif[ies] the requirement of adversary hearings." *Vitek v. Jones*, 445 U.S. 480, 495 (1980). *Accord Barefoot v. Estelle*, 463 U.S. at 899-903. Without a hearing, in which the experts explain their opinions as well as the data and reasoning process upon which their opinions are based, fact-finders simply cannot make accurate, reliable determinations of mental health facts when the experts' opinions are in conflict. *See Ake v. Oklahoma*, ____ U.S. ____, 105 S.Ct. 1087, 1096 (1985) (by "laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them").

Even if the facts are found on the basis of a full and fair adversarial hearing, however, *Townsend* imposes one additional requirement to assure that the fact-finding procedures produce accurate, reliable findings. The standard of law that guides the fact-finder must comport with the constitutional right at issue. 372 U.S. at 314-15. In this respect, Florida's 922.07 procedure is also crucially defective, for the standard that Florida has adopted—"whether [the condemned] understands the nature and effect of the death penalty and why it is to be imposed on him"—only partially reflects the reasons why the Eighth Amendment prohibits execution of the incompe-

³³ *Accord Parham v. J.R.*, 442 U.S. 584, 609 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring); *Drope v. Missouri*, 420 U.S. 162, 176 (1975); *Greenwood v. United States*, 350 U.S. 366, 375 (1956); *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, joined by Black, J.J., dissenting).

tent. As a result, it is inadequate to vindicate that constitutional guarantee.

To enforce the Eighth Amendment's prohibition, the standard of competency must reflect the rationale underlying the prohibition against executing the incompetent. *Cf. Drope v. Missouri*, 420 U.S. at 171-72 (tracing the policy reasons underlying the standard of trial competency). As we have shown, the incompetent are spared from execution for three reasons relevant here: (1) execution of the incompetent does not contribute to the goal of retribution because of the incompetent person's inability to understand that he is being put to death or that he is being killed because he killed; (2) execution of the incompetent inflicts suffering beyond that which is necessarily involved in the execution of the competent because of the incompetent person's inability to understand the reasons for his death or to prepare for death; and (3) execution of the incompetent may interfere with the incompetent person's right of access to collateral remedies. Consistent with these three reasons, a three-part standard³⁴ is required rather than the single-element standard utilized by Florida:

*First, the condemned must have sufficient intellectual and emotional capacity to understand the nature and effect of the death penalty and why it is to be carried out against him.*³⁵ This standard incorporates both of the elements necessary for the satisfaction of society's need for retribution, as well as one of the elements necessary to prevent infliction of the greater

³⁴ The standard should have only three components, because the fourth reason underlying the Eighth Amendment prohibition—related to deterrence—does not give rise to a test of competency. The need to deter prospective murders is neither weakened by the exemption of the incompetent from execution nor strengthened by the execution of the incompetent. See discussion, pp. 21-22, *supra*.

³⁵ This standard is substantially the same as Florida's standard and is similar to a component of the competency standard in Georgia, Illinois, Mississippi, Missouri, New Jersey, New Mexico, Ohio, and North Carolina. See Appendix B.

suffering inherent in executing the incompetent (i.e., why the death penalty is to be carried out against him).

*Second, the condemned must be sufficiently free from the symptoms of psychosis (or similar mental disease or defect) to have the intellectual and emotional capacity necessary to prepare for death.*³⁶ This standard provides for the other element necessary to prevent infliction of the greater suffering inherent in executing the incompetent.

*Third, the condemned must have sufficient intellectual and emotional capacity to know any fact which might exist which would make his punishment unjust or unlawful and to convey such information to his attorney.*³⁷ This standard incorporates the elements necessary to prevent incompetency from interfering with the condemned person's right of access to collateral remedies.

Accordingly, basic principles of federal law for resolution of constitutional issues require an independent determination by the federal courts of Mr. Ford's competency.

It must be emphasized that these are not hollow concepts in the present case. On behalf of Mr. Ford, substantial documentary evidence was proffered to the district court showing first the progression, and then the final result of Mr. Ford's severe psychosis. All of the doctors who examined Mr. Ford, except one whose methodology is most seriously in question, found him to be psychotic. The one psychiatrist who examined Mr. Ford over the longest period of time and who studied all available documentation and history found him to be, without question, incompetent under the Florida statutory standard. In the

³⁶ This test appears to be consistent with a component of the test described in Oklahoma: "[T]he mental powers being wholly obliterated . . . a being in that deplorable condition . . . has no understanding of the nature of the punishment about to be imposed." Appendix B.

³⁷ This standard is substantially the same as a component of the standard in Illinois, Mississippi, New Mexico, Ohio, and Oklahoma, and is similar to a component of the standard in Georgia, Missouri, New Jersey, North Carolina, and Utah. See Appendix B.

opinion of two nationally-reputed psychiatric experts, the half-hour group examination undertaken by the governor's doctors "fell below the generally accepted standard of care necessary to produce a reliable forensic psychiatric evaluation." JA 112. Accordingly, there *are* substantial factual issues in this case. These issues can only be resolved by a fair evidentiary proceeding where all of the facts may be spread upon the record for determination by a neutral decision-maker. Mr. Ford is presently incompetent. All that is requested is an opportunity to establish that fact by reliable proceedings, as are provided to any habeas corpus applicant at the bar of the federal court.

II.

FLORIDA'S STATE-CREATED ENTITLEMENT TO BE SPARED FROM EXECUTION IF INCOMPETENT GIVES RISE TO A FEDERALLY PROTECTED RIGHT TO A FAIR AND RELIABLE DETERMINATION OF COMPETENCY IN A PARTICULAR CASE

Apart from the Eighth Amendment, the Constitution is implicated in one further respect by Florida's attempt to execute a person whose competence is seriously in question. The procedural due process protections of the Fourteenth Amendment are triggered by Florida's state-created right to be spared from execution when incompetent. Even though the *Sollesbee* Court decided that the state-created interest in being spared from execution when incompetent did not invoke the procedural protections of the Fourteenth Amendment, the principles underlying *Sollesbee's* holding have evolved to such an extent in the intervening decades, that *Sollesbee* is no longer of controlling precedential value. Under contemporary principles of analysis, Florida's state-created interest in being spared from execution when incompetent is an entitlement now clearly protected by the Fourteenth Amendment. Because of this, the Court must consider anew the applicability of the Due Process Clause to the states' procedures for determining whether a condemned person is incompetent under a state-created right not to be executed when incompetent.

A. *Solesbee v. Balkcom* No Longer Controls In Determining The Process Due The Condemned In The Administration Of The State-Created Right To Be Spared From Execution When Incompetent

Solesbee v. Balkcom was decided at a time when the procedural protections of the Due Process Clause were applicable only to "rights," not "privileges." See, e.g., *Ughbanks v. Armstrong*, 208 U.S. 481 (1908); *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Phyle v. Duffy*, 34 Cal.2d 144, 208 P.2d 668, 677-78 (1949) (Traynor, J., concurring in judgment). The classification of a particular interest as a right or a privilege turned, not upon the nature of the interest, but upon the procedure which was used to protect the interest. See *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell, J., joined by Blackmun, J., concurring in part); *id.* at 210-11 & n.7 (Marshall, J., joined by Brennan and Douglas, J.J., dissenting); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).

In keeping with these principles, the *Solesbee* Court determined the applicability of the Due Process Clause by examining the procedure historically utilized to determine competency at the time of execution. It found that the interest was protected only by "an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence." 339 U.S. at 13. Reasoning that the commitment of analogous matters, such as sentencing, to the "wide discretion" of judges had led it to "emphasize[] that certain trial procedure safeguards are not applicable to the process of sentencing," 339 U.S. at 12 (citing *Williams v. New York*, 337 U.S. 241, 246 (1949)), the Court explained that "[t]his principle applies even more forcefully to an effort to transplant every trial safeguard to a determination of sanity after conviction." *Id.* Because the procedure traditionally used to protect the interest in being spared from execution when incompetent was an appeal to discretion, and because the commitment of post-conviction matters wholly to the discretion of the decision-maker had never called for procedural safeguards, the Court reasoned that procedural safeguards were inapplicable to the determination of post-conviction incompetency. In short, the interest in

being spared from execution when incompetent was only a privilege.

Since the decision in *Solesbee*, two significant evolutionary developments in due process jurisprudence have effectively overruled it as controlling precedent.

First, the Court has firmly discarded "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374 (1971). See also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Rather than examining the procedure used to protect a particular interest, modern due process analysis focuses upon the "objective expectation [of the individual], firmly fixed in state law and official. . . practice," *Vitek v. Jones*, 445 U.S. 480, 489 (1980). If the individual has a "justifiable expectation," *id.*, that the state will not arbitrarily withdraw a benefit conferred or withhold a benefit expected to be conferred, due process protects that individual's interest against "arbitrary disregard. . .," *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). See also *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7-11 (1979); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982).

While there has been no application of the state-created rights analysis to the interest of a condemned person in being spared from execution if incompetent, the analysis has been applied to two related interests—parole and probation. Under the right/privilege analysis, these interests were seen as identical to the interest of the condemned in being spared from execution if incompetent: each had previously been classified only as "privileges," which the state could grant or revoke wholly within its discretion because each "comes as an act of grace to one convicted of crime." *Escoe v. Zerbst*, 295 U.S. at 492; *Ughbanks v. Armstrong*, *supra*. See *Solesbee v. Balkcom*, 339 U.S. at 11 ("[p]ostponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general"). Despite this view, the

Court has since held—under the state-created rights analysis—that the states can create entitlements to parole and probation that are protected by due process. Such an entitlement was first found in connection with the interest of a parolee in not having his parole arbitrarily revoked, *Morrissey v. Brewer*, 408 U.S. at 481-82, then applied to the revocation of probation, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 & n.4 (1973), and finally, to the initial grant of parole, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11-12 (1979).

Since state-created rights analysis has caused a reversal of earlier decisions holding the Due Process Clause inapplicable to probation and parole, it should lead to the same result in a state which has created a "justifiable expectation" that a condemned person will be spared from execution when incompetent. Under modern due process analysis, the condemned person who is incompetent, like the probationer, "can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, [295 U.S. at 492], that probation [or a stay of execution while incompetent] is an 'act of grace.'" *Gagnon v. Scarpelli*, 411 U.S. at 782 n.4. Accordingly, the abandonment of the right/privilege analysis requires re-evaluation of the applicability of the Due Process Clause to the determination of competency at execution.

A second post-*Sollesbee* development in due process jurisprudence further confirms the need for re-evaluation. As already noted, the *Sollesbee* Court relied significantly upon *Williams v. New York*, *supra*, to support its determination that the Due Process Clause was inapplicable to the determination of competency at the time of execution. Since *Williams* "emphasized that certain trial procedure safeguards [were] not applicable to the process of sentencing," *Sollesbee*, 339 U.S. at 12, the *Sollesbee* Court reasoned that those safeguards could not be applicable to the determination of competency *after* sentencing. *Id.* In the years since the *Sollesbee* decision, however, this aspect of the *Williams* analysis has been discarded.

As Justice Stevens noted for a plurality of the Court in *Gardner v. Florida*, "it is now clear that the sentencing pro-

cess, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358. Because of this, the Court has required not only that sentencing proceedings satisfy due process but that capital sentencing proceedings provide heightened procedural safeguards, that may not be required in non-capital proceedings, in order to avoid the risk of an unwarranted death sentence.³⁸ With the evolution of these principles, the jurisprudential premise that *Williams* provided for the reasoning of the *Solesbee* Court has been significantly eroded. Accordingly, the Court should reconsider whether, in light of the unique applicability of the Due Process Clause to capital sentencing proceedings today, the Due Process Clause should also extend to proceedings for determining competency at execution.

Admittedly, the heightened due process protections which the Court began to require in capital sentencing proceedings in the decade of the 1970's were developed to assure reliability in the decision to impose death, not in the decision to carry out an already-imposed (and otherwise legally proper) death sentence. However, the rationale for heightened due process protections in the sentence imposition proceeding is equally compelling in a proceeding to determine whether to carry out a death sentence against a person who appears to be incompetent. The rationale is based upon "the penalty of death [being] qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The "qualitatively different" character of death requires as well that the determination of competency at execution be reliable, even if all the safeguards attendant to the initial sentencing decision are not required. As Justice Frankfurter reasoned in his dissent in *Solesbee*, the inquiry into competency

must be fair in relation to the issue for determination. In the present state of the tentative and dubious knowledge as to mental diseases and the great strife of schools in regard to them, it surely operates unfairly to make such determinations not only behind closed doors but without

³⁸ See *Caldwell v. Mississippi*, ____ U.S. ____, 105 S.Ct. 2633, 2639-40 & n.2 (1985) (citing cases).

any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance.

339 U.S. at 24-25. Echoing these strains in dissent in Mr. Ford's case, Judge Clark brought the need for "fair[ness] in relation to the issue for determination" into post-*Furman* perspective:

Admittedly, we are not reviewing here the question of whether death is the appropriate punishment for Mr. Ford and the procedures used to make that decision. Nevertheless, the procedures used to determine whether the death penalty is a permissible punishment for him at this time is being reviewed. The reliability required for capital decisions is still relevant and adequate procedures to determine his *present* death eligibility are still required.

752 F.2d at 533; J.A. 197 (emphasis in original).

For these reasons, the evolution of due process jurisprudence since *Sollesbee* requires a new evaluation of the applicability of the Due Process Clause to the determination of competency at the time of execution. *Sollesbee* can no longer be relied on as a satisfactory resolution of this issue.³⁹

B. Florida Has Created As A Matter Of State Law A Justifiable Expectation That A Condemned Person Who Is Incompetent At The Time Of Execution Will Not Be Executed

Florida has, by case law and statute, declared that a condemned person who is incompetent *shall not* be executed.

³⁹ The need for re-evaluation is just as compelling as the request recently made by the petitioner in *Ake v. Oklahoma*, ____ U.S. ____, 105 S. Ct. 1087 (1985), where the Court reconsidered another *Sollesbee*-era due process decision, *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953), because of the erosion of the jurisprudential basis of that decision by subsequent developments. The Court explained that its decision to reconsider *Smith* was primarily the result of the evolution since *Smith* of "elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to receive a fair hearing," as well as "the extraordinarily enhanced role of psychiatry in criminal law today." 105 S.Ct. at 1098. The evolution of the "elemental constitutional rights" referred to in *Ake* is not precisely the evolution that requires reconsideration of the issue previously decided in *Sollesbee*. However, the evolution of the Due Process Clause in the respects just discussed is *parallel to*—and just as significant as—the evolution that led the Court to reconsider the issue previously decided in *Smith*.

Whether this declaration has created a right protected by the Due Process Clause can be determined only by examining "the nature of the interest at stake" as that interest is now defined in Florida law. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (emphasis in original). When this is done, the conclusion is unavoidable that Florida has created a right to be spared from execution when incompetent that is protected by the Due Process Clause.

In order to determine the "nature of the interest at stake," the Court has explained that the actual language of the decisions and statutes which have created the interest must be analyzed. See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983); *Vitek v. Jones*, 445 U.S. at 489-90; *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. at 11-12. Where the language mandates a particular course of state action upon the existence of specified factual predicates, the individual interest created or protected thereby is an entitlement that is protected by the Due Process Clause. *Hewitt*, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); *Greenholtz*, 442 U.S. at 10 (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual").

When analyzed in this manner, the interest of the condemned in Florida in being spared from execution when incompetent is quite clearly a state-created entitlement. If the factual predicate of incompetency is demonstrated in Florida, state law mandates that the condemned person's execution be stayed during the period of incompetency. The present statute governing competency at the time of execution sets out this rule:

- (1) When the Governor is informed that a person under sentence of death may be insane, he *shall* stay execution of the sentence. . . .

* * * *

- (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on

him, he *shall* have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he *shall* be kept there until the proper official of the hospital determines that he has been restored to sanity. . . .

Fla. Stat. § 922.07 (emphasis supplied). Court decisions in Florida have followed the same rule for at least sixty years. See, e.g., *Ex parte Chesser*, 93 Fla. 590, 112 So. 87, 89 (1927) (when a person is condemned to die, "if, after judgment, he becomes of nonsane memory, execution shall be stayed"); *State ex rel. Deeb v. Fabisinski*, 111 Fla. 454, 465-67, 152 So. 207, 211 (1933) ("the rule at common law is well settled that a person while insane cannot be tried, sentenced, nor executed"); *Hysler v. State*, 136 Fla. 563, 187 So. 261, 262 (1939) (if prisoner is "found to be insane an appropriate order should be made for his custody until his return to sanity is appropriately adjudicated"); *Goode v. Wainwright*, 448 So.2d 999, 1001 (Fla. 1984) ("[w]e agree with [Goode's] contention that an insane person cannot be executed"). Florida has thus created an entitlement—not a "mere hope," *Greenholtz*, 442 U.S. at 11—that one will be spared from execution if incompetent.

Any argument that the interest in being spared from execution when incompetent is not a right thus has no support in Florida law. While the law in other states may permit the interest to be characterized as a "mere hope" that the governor will decide to exercise his or her "humane discretion" to spare the incompetent from execution, the law of Florida does not.⁴⁰

⁴⁰ In this context, it should be noted that the state-created interest under consideration in *Sollesbee v. Balkcom*, *supra*, could properly have been analyzed as a mere hope for humane disposition. Significantly, Georgia's statute at that time—in contrast to Florida law—did not require the governor to have the condemned examined upon a showing of incompetency or even to stay the execution upon determining that the condemned was incompetent. Disposition was wholly within the discretion of the governor.

Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may chose; . . . and

C. Florida's Statutory Competency-Determination Procedure Fails To Provide The Reliable Fact-Finding Procedure Required By The Fourteenth Amendment In The Administration Of The State-Created Right To Be Spared From Execution If Incompetent.

Once a state-created entitlement or substantive right is identified, the extent of procedural protection required by the Constitution must then be ascertained. *Morrissey v. Brewer*, 408 U.S. at 481. Since "[a] procedural rule that may satisfy due process in one context may not satisfy procedural due process in every case," *Bell v. Burson*, 402 U.S. at 540, in order to determine the procedural safeguards that are due, the Court has employed a balancing process that weighs three factors: the private interest that will be affected by the government action at issue, the public interest that will be affected if the safeguards are provided, and the probable effect such safeguards will have on reducing the risk of erroneous decisions. See *Logan v. Zimmerman Brush Co.*, 455 U.S. at 434; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17-18 (1978); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). See also *Ake v. Oklahoma*, 105 S.Ct. at 1094.

the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force.

Solesbee v. Balkcom, 205 Ga. 122, 52 S.E.2d 433, 435 (1949) (quoting § 27-2602, *Georgia Code*) (emphasis supplied). In order to emphasize that the Due Process Clause did not apply to a Georgia inmate's interest in being spared from execution when incompetent, the Georgia Supreme Court contrasted that interest with the interest of a California inmate created by § 1367 of the California Penal Code, which provided that "[a] person cannot be . . . punished for a public offense, while he is insane." 52 S.E.2d at 437. Recognizing that this provision of California law (which is identical to Florida law) conferred "an absolute right . . . upon the condemned person," the Georgia court reasoned, "To protect this right the due-process clause of the Constitution may be invoked." *Id.* By contrast, the court concluded, "[T]he State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he has no such right. . . ." *Id.*

When applied in the context of determining competency at the time of execution, these factors require the state courts to provide the same procedural safeguards in enforcing the state-created right which they must provide if, in the context of the Eighth Amendment claim, their factfindings are to be sufficiently reliable to avoid the need for a federal evidentiary hearing: a full and fair evidentiary hearing, on the basis of which the factfinder reliably finds the relevant facts.⁴¹ As we have already shown, Florida's present competency determination process provides none of the procedural safeguards demanded by this analysis.

The *private interest* that is affected by a state's determination of competency at the time of execution is obvious and compelling: the right of a condemned person to have a final opportunity to assert matters known only to him which would make his execution unlawful or unjust, as well as the right to appreciate the meaning of, and to prepare for, the termination of his life. Because this interest is concerned with the condemned person's very survival, it weighs heavily in favor of a reliable fact-finding procedure. See *Mathews v. Eldridge*, 424 U.S. at 340-43; *Goldberg v. Kelly*, 397 U.S. at 264. Just as compelling is the interest of the condemned in having his competency determined accurately, for only by accurate determination will the interests of the truly incompetent be protected. While the Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case," *Ake v. Oklahoma*, 105 S.Ct. at 1097, that interest clearly extends to the determination of competency at the time of execution.

⁴¹ The "minimum requirements of due process" underlying the concept of a full and fair evidentiary hearing are well known. See *Morrissey v. Brewer*, 408 U.S. at 488-89. See also *Vitek v. Jones*, 445 U.S. at 494-96; *Gagnon v. Scarpelli*, 411 U.S. at 786. To this list must now be added the right of an indigent to counsel for the reasons articulated in *Vitek v. Jones*, 445 U.S. at 496-97, and to the assistance of a competent psychiatrist. *Ake v. Oklahoma*, 105 S.Ct. at 1097. See also *Vitek v. Jones*, 445 U.S. at 497-500 (Powell, J., concurring).

The *public interest* has three aspects. The first two—the interest in reducing the cost of criminal proceedings and the interest in avoiding undue delay in executions occasioned by frivolous claims of incompetence—weigh against additional safeguards. The third—the interest in sparing the truly incompetent from execution—weighs in favor of additional safeguards. With respect to costs, Florida already pays three psychiatrists to evaluate the condemned. The additional cost occasioned by a hearing should not be burdensome, and in any event, “‘does not justify denying a hearing meeting the ordinary standards of due process,’” *Goldberg v. Kelly*, 397 U.S. at 261. See also *Bell v. Burson*, 402 U.S. at 540-41. With respect to undue delay, the states can provide a procedure that is well-equipped to dispose quickly and efficiently of frivolous claims. Cf. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts; Rules 12 and 56 of the Federal Rules of Civil Procedure. These or similar devices could be incorporated into state hearing procedures. Further, such procedures can adequately handle any “flood” of claims of incompetency, should there ever be one.⁴² The courts have been trusted for hundreds of years to prevent delay due to the assertion of frivolous claims of incompetency because of their ability to distinguish “pretenses and realities.” Hawles, *Remarks on the Trial of Mr. Charles Bateman* at 478.

The interest of the public that will be affected most significantly by the safeguards is the interest that the public *shares* with the condemned: the interest in accurate determinations of competency, to avoid executing the truly incompetent. Cf. *Ake*

⁴² The Court should take notice that there has not been—nor is there any sign that there will be in the future—a flood of frivolous claims of incompetence. Governor Graham has signed 122 death warrants in his seven years in office, and in only four cases have claims of execution incompetency been asserted. Further, during the time that Mr. Ford's case has had high visibility—between May 30, 1984 when his execution was stayed and the present—the claim of incompetency at execution has been raised in only two of the forty-two cases in which the Florida governor has signed death warrants. If there were any floodgates to open, Ford has provided a substantial opportunity for them to open, and they have not.

v. *Oklahoma*, 105 S.Ct. at 1094-95 ("[t]he State's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases"). When life and death are at issue, the Court's post-*Furman* jurisprudence recognizes that the public interest in reliability and accuracy is of paramount importance. *Id.* at 1097 ("[t]he State . . . has a profound interest in assuring that its ultimate sanction is not erroneously imposed"). Accordingly, the public interest is very much in keeping with Justice Frankfurter's expression of it in his *Sollesbee* dissent:

It is a groundless fear to assume that it would obstruct the rigorous administration of criminal justice to allow the case to be put for a claim of insanity, however informal and expeditious the procedure for dealing with the claim. The time needed for such a fair procedure could not unreasonably delay the execution of the sentence unless in all fairness and with due respect for a basic principle in our law the execution should be delayed. The risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity, the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship.

339 U.S. at 25. Accord *Gardner v. Florida*, 430 U.S. at 360 ("the time invested in ascertaining the truth will surely be well spent if it makes the difference between life and death").⁴³

Finally, as we have already shown, the *risk of error* inherent in the determination of legal/psychiatric issues is great unless the determination of such issues is entrusted to a full adversarial hearing. See *Ake v. Oklahoma*, 105 S.Ct. at 1096; *Bare-*

⁴³ Notably, the public's interest in accurate competency determinations also *coincides* with its interest in avoiding delay. Under the present Florida procedure, it is as likely that a competent person will be found *incompetent* as it is that an *incompetent* person will be found *competent*. The procedure is simply an unreliable procedure for arriving at the truth. Accordingly, the public's interest in avoiding execution of the incompetent and in not delaying the execution of the competent can be best satisfied by a reliable fact-finding procedure.

foot v. Estelle, 463 U.S. at 899-903; *Vitek v. Jones*, 445 U.S. at 495. A full and fair evidentiary hearing is the only procedural mechanism that assures the accurate determination of the truth of a claim of incompetence. Unquestionably, the effect of such a safeguard is to reduce the risk of erroneous decisions.

Accordingly, the Fourteenth Amendment demands that the states determine competency, under a state-created right to be spared from execution if incompetent, on the basis of a full and fair evidentiary hearing. Florida's 922.07 procedure in no respect complies with this mandate of the Fourteenth Amendment.

CONCLUSION

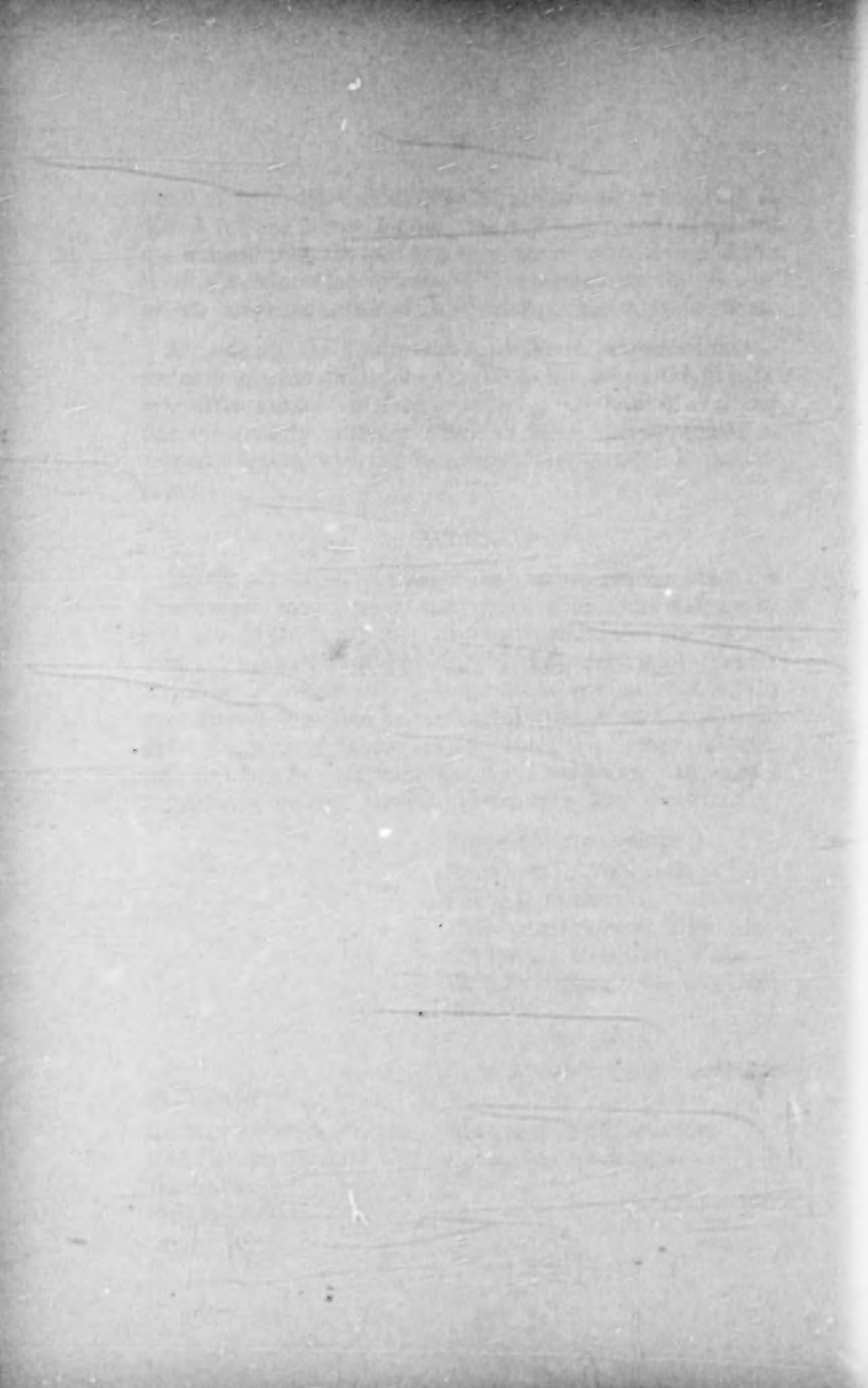
For these reasons, petitioner respectfully requests that the Court vacate the judgment and opinion of the Court of Appeals, and remand Mr. Ford's case, with instructions that the District Court (1) conduct an evidentiary hearing to determine whether Mr. Ford is competent, in order to determine whether his execution is forbidden by the Eighth Amendment, and/or (2) grant the writ of habeas corpus unless the State of Florida provides for the determination of his competency through a procedure consistent with the Fourteenth Amendment.

Respectfully submitted,
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APPENDIX



APPENDIX A
CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

Constitution Of The United States

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

[Section 922.07, *Florida Statutes* (1983), as amended (1985)]

922.07 Proceedings when person under sentence of death appears to be insane.—

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

History.—s. 268, ch. 19554, 1939; CGL 1940 Supp. 8663 (278); s. 134, ch. 70-339.

CHAPTER 85-193

Senate Bill No. 1185

An act relating to executions; amending s. 922.07, F.S.;

directing the Governor to have certain condemned persons committed to the Department of Corrections Mental Health Treatment Facility; directing the facility administrator to notify the Governor of certain findings; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (3) and (4) of section 922.07, Florida Statutes, are amended to read:

922.07 Proceedings when person under sentence of death appears to be insane.—

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane.]

(4) When a person under sentence of death has been committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane,] he shall be kept there until the *facility administrator* [proper official of the hospital] determines that he has been restored to sanity. The *facility administrator* [hospital official] shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor June 18, 1985.

Filed in Office of Secretary of State June 18, 1985.

CODING: Words in [Bracket Type] are deletions from existing law; words in [Italicized Type] are additions.

APPENDIX B
STANDARDS OF COMPETENCY FOR EXECUTION
NATIONAL SURVEY OF STATE STATUTORY
AND COMMON LAW

**1. Explicit Statutory Proscription Against Execution Of
The Incompetent**

State/Statute	Competency Standard
ALABAMA Code § 15-16-23 (1982)	"insane"
ARIZONA Rev. Stat. Ann. §§ 13.4021 - .4024 (1978)	"insane"
ARKANSAS Stat. Ann. § 43-2622 (1977)	"insane"
CALIFORNIA Penal Code §§ 3700 - 3704.5 (1982)	"insane"
COLORADO Rev. Stat. (1978) §§ 16-8-110 et seq.	"incompetent to proceed"
CONNECTICUT Gen. Stat. Ann. § 54-101 (1983)	"insane"
FLORIDA Stat. (1981) § 922.07	"whether he understands the nature and effect of the death penalty and why it is to be imposed upon him"

State/Statute

GEORGIA
Code (1983)
§§ 27-2601-2604

ILLINOIS
Stat. Ann. ch. 38,
¶ 1005-2-3
(Smith-Hurd 1982)

KANSAS
Stat. § 22-4006
(Supp. 1981)

Competency Standard

"insane." *See also* 1976 Op. Att'y Gen. Ga. 223 (execution competency test is "whether the individual is capable 'of presently understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the [proceedings] preferred against him demand'").

"because of a mental condition he is unable to understand the nature and purpose of [the death] sentence." *See also* *People v. Geary*, 298 Ill. 236, 131 N.E. 652, 655 (1921) ("within the meaning of our statute, the defendant is [competent] when he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for originally, the purpose of his punishment, the impending fate which awaits him, and a sufficient mind to know any facts which might exist which would make his punishment unjust or unlawful, and sufficient intelligence to convey such information to his attorney or the court").

"sane or insane"

State/Statute**Competency Standard****KENTUCKY**

Rev. Stat. (1980)

§ 431.240(2)

"insane"

MARYLAND

Crim. Law Code Ann.

Art. 27, § 75(c)

(Supp. 1985)

"insane"

MASSACHUSETTS

Gen. Laws Ann.

ch. 279, § 62

(1984 Supp.)

"insane"

MISSISSIPPI

Code Ann. § 99-19-57

(Supp. 1985)

"insane" which is defined as "not hav[ing] sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorney or the court"

MISSOURI

Rev. Stat. § 552.060

(1985 Supp.)

"as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out"

MONTANA

Code Ann.

§ 46-19-201-221 (1983)

"lacks mental fitness"

State/Statute**Competency Standard****NEBRASKA**

"insane"

Rev. Stat.

§ 29.2537-.2539 (1979)

NEVADA

"insane"

Rev. Stat.

§§ 176.425-.455 (1983)

NEW MEXICO

"insane." *See also In re Smith*, 25 N.M. 48, 176 P. 819, 823 (1918) ("If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any facts which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court, then he would not be sane and should not be executed").

Stat. Ann. (1978)

§§ 31-14-4 - 31-14-7 (1978)

NEW YORK

"insane"

Correct. Law §§ 655-657
(McKinney 1984 Supp.)

OHIO

"insane." *See also In re Keaton*, 19 Ohio App. 2d 254, 250 N.E.2d 901, 906 (1969) (test under the statute is "whether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to

Rev. Code Ann.

§ 2949.28 - .30 (1979)

State/Statute**Competency Standard**

Ohio

know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court’”).

OKLAHOMA

Stat. Ann. tit. 22,
§§ 1004 - 1008 (Supp.
1985)

“insane.” *See also Bingham v. State*, 82 Okla. Crim. 305, 310-11, 169 P.2d 311, 314-15 (1946) (test at common law was “a state of general insanity, the mental powers being wholly obliterated and a being in that deplorable condition can make no defense whatsoever and has no understanding of the nature of the punishment about to be imposed”; court also cites with approval test articulated in *In re Smith*, 25 N.M. 48, *supra*).

SOUTH DAKOTA

Codified Laws (1979)
§§ 23A-27A-21

“mentally incompetent to proceed”

UTAH

Code Ann. § 77-19-13
(1982)

“suffering from a mental disease or defect resulting either: (1) In his inability to comprehend the nature of the proceedings against him or the punishment specified for the offense charged; or (2) In his inability to assist his counsel in his defense.” § 77-15-2.

WYOMING

Stat. Ann.
§§ 17-13-901-904 (1982)

“insane”

2. Judicial Adoption Of Common Law Rule Proscribing Execution Of The Incompetent:

State	Citation (Standard)
LOUISIANA	<i>State v. Allen</i> , 204 La. 513, 515, 15 So.2d 870, 871 (1943) ("insane").
PENNSYLVANIA	<i>Commonwealth v. Moon</i> , 383 Pa. 18, 117 A.2d 96, 102 (1955) (the "controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnosis mental illness . . . the determinative issue was whether that illness <i>so lessened</i> his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care") (emphasis in original).
TENNESSEE	<i>Jordan v. State</i> , 124 Tenn. 81, 135 S.W. 327 (1910) ("insane").
WASHINGTON	<i>State v. Davis</i> , 6 Wash.2d 696, 108 P.2d 641 (1940) ("insane").

3. General Statutory Procedures Requiring Transfer of Incompetent Prisoners to State Mental Hospital:

State/Statute	Competency Standard
DELAWARE Code Ann. tit. 11, § 406 (1979)	"mentally ill"
INDIANA Code. Ann. § 11-10-4-1 et seq. (West 1982)	"mentally ill and in need of care and treatment in the department of mental health or a mental health facility"

State/Statute

NORTH CAROLINA
Gen. Stat. § 15A-1001
(1983)

Competency Standard

"by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner"

RHODE ISLAND
Gen. Laws (1984)
§ 40.1-5.3-6 et seq.

"insane"

SOUTH CAROLINA
Code § 44-23-220 (1985)

"mentally ill or mentally retarded"

VIRGINIA
Code § 19.2-177 (1983)

"insane or feebleminded"

4. States Which Have Recently Repealed Statutes, Leaving Case Law Which Supports The Common Law Rule:

State**Citation (Standard)**

NEW JERSEY

In re Lang, 77 N.J.L. 207, 71 A. 47, 48 (1908) (if prisoner is "capable of understanding the nature and object of the proceedings against him, if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense in a rational manner, he is . . . deemed to be sane, although on some other subjects his mind may be deranged or unsound").

TEXAS

Ex parte Morris, 96 Tex. Crim. 256, 257 S.W. 894 (1924) ("insane").

NOTE:

Nine states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, West Virginia, and Wisconsin) have no death penalty.

Two states (Idaho and New Hampshire) have a death penalty but no law relating to competency for execution.

Two states (Oregon and Vermont) were undetermined.

SUMMARY: OVERALL CATEGORIES

Explicit statutory proscription	25
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Statutory procedure applying to "any" prisoner	6
No case law or statute (but yes a death penalty)	2
Repealed statutes, leaving common law	2
No death penalty	9
Undetermined	2
	<u>50</u>

METHOD OF STUDY: This survey includes an examination of statutory and case law in each of the fifty states from 1895-present.

FILED

FEB 21 1986

JOSEPH F. SPANIOLO, JR.
CLERK

NO. 85-5542 (9)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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Counsel for Respondent

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104 PR

QUESTIONS PRESENTED

I.

WHETHER THE HUMANITARIAN
POLICY DEFERRING EXECUTION
OF AN INSANE PRISONER UNTIL
HIS SANITY IS RESTORED SHOULD
BE ELEVATED TO AN EIGHTH
AMENDMENT RIGHT?

II.

WHETHER, IF AN EIGHTH AMEND-
MENT RIGHT TO BE SANE AT
THE TIME OF EXECUTION EXISTS,
FLORIDA'S PRESENT PROCEDURE
ADEQUATELY PROTECTS IT?

III.

WHETHER, PURSUANT TO THIS
COURT'S CONTROLLING PRECEDENT
OF SOLESBEE v. BALKCOM,
339 U.S. 9 (1950), FLORIDA'S
PROCEDURE FOR DETERMINING
SANITY OF CONDEMNED PRISONERS
MEETS THE REQUIREMENTS OF
FOURTEENTH AMENDMENT PROCEDURAL
DUE PROCESS?

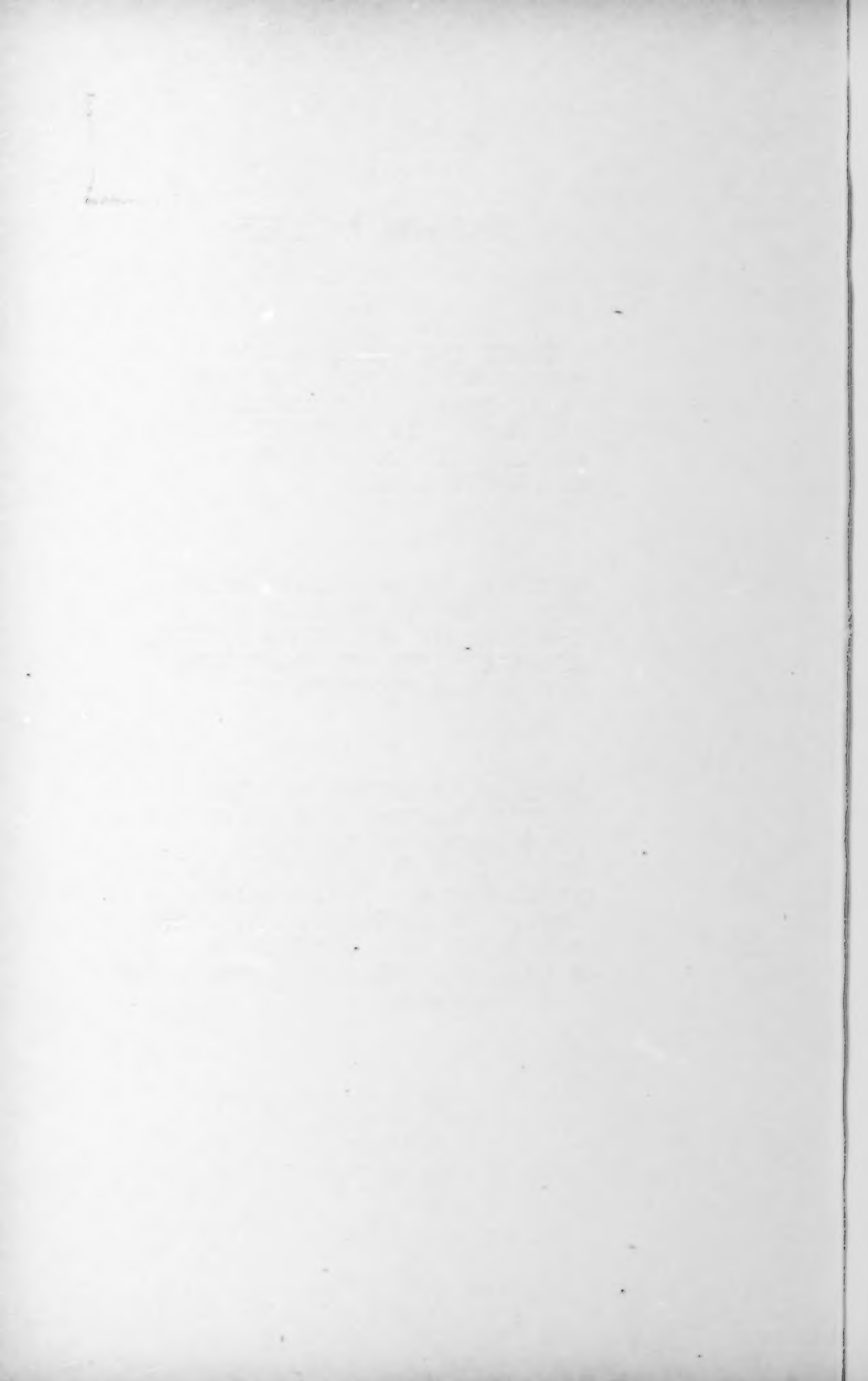


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THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF THE

UNIVERSITY OF OXFORD

IN TWO VOLUMES

THE FIRST

VOLUME

THE SECOND

VOLUME

THE THIRD

VOLUME

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NO. 85-5542

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

OPINIONS BELOW

Respondent accepts the
Petitioner's citations. In addition,
the Florida Supreme Court's opinion
on the issues raised in this case
is reported as Ford v. Wainwright,
451 So.2d 471 (Fla. 1984), and it is
set out at A 5.

JURISDICTION

Respondent accepts the
Petitioner's statement.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

Respondent accepts the
Petitioner's statement.

STATEMENT OF THE CASE

On July 21, 1974, the Petitioner, Alvin Bernard Ford, murdered a police officer in the course of an attempted robbery. After years of litigation, his direct and collateral appeals were concluded. Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, Ford v. Florida, 445 U.S. 972 (1980) [direct appeal]; Ford v. State, 407 So.2d 907 (Fla. 1981) [a

consolidated collateral appeal and original habeas corpus action]; Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982) [panel decision] and Ford v. Strickland, 696 F.2d 804 (11th Cir), cert. denied, 464 U.S. 865 (1983) [a federal habeas corpus denial which was affirmed by a panel and ultimately the en banc Eleventh Circuit]. Ford was also a named party in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

In late 1983, the governor of Florida appointed a commission of three psychiatrists pursuant to the provisions of Fla. Stat. §922.07 (1983) to evaluate Ford's sanity for execution. The commissioners were directed to examine Ford for the

purpose of determining whether he understood the nature of the death penalty and why it was to be imposed upon him. The commissioners examined Ford on December 19, 1983. They also reviewed materials submitted to them by counsel for Ford, inspected Ford's prison cell and spoke to his guards, and reviewed his prison medical records. Each commissioner then submitted a written report to the governor stating his findings.

In his Statement of the Case, Ford describes the findings as "conflicting." The record shows otherwise, for all three commissioners independently concluded that Ford understood the death penalty and why it was to be imposed on him.

Dr. Ivory reported:

I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior he showed that he is in touch with reality
. . . (A 98)

This inmate's disorder, although severe, seems contrived and recently learned. My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty.
(A 100)

Dr. Mhatre's report to the governor stated:

The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the

following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized . . .

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion

that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed upon him. (A 103)

Dr. Afield concluded:

. . . Although this man is severely disturbed, he does understand the nature of the death penalty that he is facing, and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him. (A 105-106)

By signing a death warrant for Ford on April 20, 1984, the governor determined Ford was sane within the meaning of Fla. Stat. §922.07(1). Ten days prior to Ford's scheduled May 31, 1984, execution, Ford's counsel filed in the state trial court a motion for hearing and

appointment of experts for a determination of competency to be executed. The motion was denied. The Florida Supreme Court affirmed the trial court's order. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). The Florida Supreme Court held that the gubernatorial proceeding outlined in Fla. Stat. §922.07 is the exclusive means for determining competency to be executed and there was no right to a judicial determination (A 9-10).

Ford's counsel then filed his second Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida, on May 25, 1984 (A 11-124). The State filed a response (A 125-140). The District Court heard legal

argument on May 29, 1984. At the conclusion of the hearing, the court announced its ruling orally. It found the petition constituted an abuse of the writ (A 164). Alternatively, on the merits, the District Court ruled the gubernatorial proceeding under Fla. Stat. §922.07, was properly followed and relief was denied (A 164).

A divided panel of the United States Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and a stay of execution on May 30, 1984. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). By a vote of 6-3, this Court denied the State's motion to vacate the stay. Wainwright v. Ford, ___ U.S. ___, 104 S.Ct. 3498 (1984).

After a full briefing and oral argument, a panel of the Eleventh Circuit affirmed, by a 2-1 vote, the District Court's order. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). The majority held this Court's opinion in Solesbee v. Balkcom, 339 U.S. 9 (1950), which had been recently applied by a panel of the Eleventh Circuit in Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984), was controlling. The portion of Solesbee v. Balkcom, supra, quoted by the Court of Appeal as dispositive, states:

We are unable to say that it offends due process for a state to deem its governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors.

Id. at 12 (quoted at A 187).

Rehearing en banc was denied (A 202-203). This Court granted Ford's Petition for Certiorari on December 9, 1985 (A 207).

SUMMARY OF THE ARGUMENT

I. The execution of Alvin Bernard Ford, a state death row inmate who has had over eleven years to challenge his conviction, and whose sanity to be executed has been determined by Florida's governor pursuant to Fla. Stat. §922.07 (1983), will not offend the cruel and unusual punishment clause of the Eighth Amendment.

At common law, it was recognized an insane man should not be executed, as a matter of humanitarian principle. This was not considered an individual right, but rather, an appeal was made to the discretion of the tribunal having authority to postpone sentence. Solesbee v. Balkcom, 339 U.S. 9 (1950). Thus, the Framers

could not have intended that this social policy be incorporated in the Eighth Amendment as a fundamental personal right.

Deferment of an insane man's execution does not fall within the scope of the Eighth Amendment for several reasons. First, it operates as a temporary reprieve only and not as a permanent bar to execution, unlike this Court's past interpretation of the Eighth Amendment as setting substantive limits on punishment. Second, there has never been a single agreed-upon rationale underlying the policy of postponing the execution of an insane man, so there is no compelling premise to support Ford's argument that his execution would offend the dignity of man.

Third, an examination of contemporary standards as revealed by present state statutes, confirms that the common law view equating deferment of the execution of the insane with clemency is still accepted today. Finally, this Court should not find an Eighth Amendment right because post-conviction insanity occurs at a stage outside the criminal process after the validity of the conviction and sentence are no longer in dispute.

II. If this Court determines the Eighth Amendment prohibits the execution of the insane, the Florida procedure outlined in Fla. Stat.

§922.07 (1983), adequately prevents it. Ford was examined by an appointed commission of three psychiatrists who reported to the

governor their conclusion that he was sane. Counsel for Ford was present at the examination, and was permitted to submit written material to the commissioners and to the governor. Ford is not entitled to a federal habeas corpus evidentiary hearing to determine his present sanity because he is not challenging his conviction. The function of habeas corpus is to secure release from illegal custody. The issue of post-conviction sanity is outside the criminal process. Less stringent procedural requirements apply. The governor, acting as a neutral and detached decisionmaker, with the aid of psychiatrists, was a proper party to make the determination that Ford was sane for purposes of execution.

Florida's standard of competency to be executed is that a prisoner understands the nature of the death penalty and why it is to be imposed upon him. This is an adequate standard, for Ford has no further right of access to the courts.

III. In Solesbee v. Balkcom, 339 U.S. 9 (1950), this Court upheld a procedure like Florida's for determining sanity to be executed as comporting with due process. Solesbee is still valid and it should be dispositive of Ford's claim that Fla. Stat. §922.07 fails to satisfy procedural due process. Solesbee held the determination of post-conviction insanity could be deemed an executive function, akin to the clemency authority. It has not been

overruled by Gardner v. Florida, 430 U.S. 349 (1977), because Gardner deals with sentence imposition, whereas the issue of competency to be executed arises long after sentencing and is not part of the judicial process.

Due process is flexible and what process is due depends upon the situation. The Florida procedure allows the governor to make the determination of sanity to be executed, subsequent to the receipt of reports from a commission of appointed experts. The procedure was followed in this case and all three members of the commission concluded Ford was sane. The balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976) is satisfied. Ford's private interest

is insubstantial because he has had full review of his conviction. The State has a valid and compelling interest in an end to litigation. The risk of error is minimized by the Florida statute which provides for experts to advise the governor.

To require an adversarial judicial proceeding, subject to appellate review, will invite endless litigation. Solesbee v. Balkcom, supra, should be reaffirmed by upholding the Florida procedure for determining competency to be executed.

ARGUMENT

I.

THE HUMANITARIAN POLICY
DEFERRING EXECUTION OF AN
INSANE PRISONER UNTIL HIS
SANITY IS RESTORED IS NOT
A FUNDAMENTAL RIGHT OF THE
INDIVIDUAL REQUIRING EIGHTH
AMENDMENT PROTECTION.

Alvin Bernard Ford murdered a
helpless, wounded police officer--
Dimitri Walter Ilyankoff--on July 21,
1974, by shooting him in the back
of the head at close range. He was
tried and sentenced to death. His
challenges to the validity of his
conviction and sentence were rejected
by the state and federal courts in
the ten year period following the
commission of the crime.

Although the legality of the
conviction is no longer at issue,
Ford's sentence has not been carried

out. His remaining challenge to the State's right to execute him is his assertion that the Eighth Amendment proscribes the execution of an insane person as "cruel and unusual" punishment. Ford alleges he is presently insane¹ and the Florida procedure for determining sanity to be executed is inadequate to satisfy the federal due process standards which would inexorably follow if the court accepts his Eighth Amendment claim. The State maintains the humanitarian principle deferring execution of an insane person is not a substantive Eighth

¹This claim was never presented to any court until ten days prior to his scheduled 1984 execution, although according to his pleadings, his mental problems began in December, 1981.

Amendment right of the condemned.

Moreover, even if the court determines there is such a right, the Florida gubernatorial proceeding adequately protects it.

The Florida procedure, which was followed in this case, is outlined in Fla. Stat. §922.07 (1983). When a condemned prisoner's sanity is in question, the governor appoints a commission of three psychiatrists. The commissioners are directed to examine the prisoner and advise the governor whether he understands the nature of the death penalty and why it is to be imposed upon him. In this case, all three psychiatrists reported to the governor that Ford was sane within the meaning of the statute. By signing Ford's death

warrant, the governor determined he was sane for purposes of execution.

The present Florida procedure reflects the common law policy. As described in this Court's decision in Solesbee v. Balkcom, 339 U.S. 9, 13 (1950), "the heart of the common law doctrine has been that a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence." Stated another way, it is "an appeal to the humanity" of a tribunal to postpone execution. People v. Preston, 345 Ill. 11, 177 N.E. 761 (1931); People v. Eldred, 103 Colo. 334, 86 P.2d 248 (1938). At common law, a stay of execution due to insanity was discretionary with the court

or the executive in the exercise of clemency; there was no absolute right to a hearing and no provision for judicial review. People v. Riley, 37 Cal.2d 510, 235 P.2d 381, 384 (1951). The decision to spare an insane person from execution was not deemed to be an individual right and the Framers of the Constitution could not have intended that it be included within the "cruel and unusual" punishment clause of the Eighth Amendment. The primary concern of the drafters of the Eighth Amendment was to proscribe torture and other barbarous methods of punishment. Estelle v. Gamble, 429 U.S. 97, 101 (1976). The "cruel and unusual punishment" clause was taken from the English Bill of Rights adopted

in 1689,² and due to the prevailing view that the clause only prohibited certain methods of punishment, it was rarely invoked throughout the nineteenth century. Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Cal.L.Rev. 839 (1969).

The fact that no court has ever held execution of the insane to be forbidden by the Eighth Amendment is itself evidence that the Framers did not so intend. The common law prohibition against executing the insane operates only as a temporary reprieve; since the validity of the original judgment and sentence is not

²See, J. Story, On the Constitution of the United States, §1908 at 680 (3rd Ed. 1858), cited in Furman v. Georgia, 408 U.S. 238, 317 (1972).

at issue, the prisoner can be executed once his sanity has been restored.

The postponement of an execution is not within the scope of the Eighth Amendment, which has always been considered to be directed at the method or kind of punishment imposed for the violation of criminal statutes. Powell v. Texas, 392 U.S. 514, 531-532 (1968). It bans punishments that are barbaric and excessive in relation to the crime committed, Coker v. Georgia, 433 U.S. 584, 592 (1976), and imposes substantive limits on what can be made criminal and punished as such. Gregg v. Georgia, 428 U.S. 153, 172 (1976), citing Robinson v. California, 370 U.S. 660 (1962). See also, Ingraham v. Wright,

430 U.S. 651, 667 (1977). To accept Ford's position would not prevent his eventual execution, but would mean only that states cannot execute condemned prisoners who are allegedly insane until their sanity is restored. Such a deferment of execution does not merit Eighth Amendment protection, and, in Florida, is properly left to the governor.

Aside from the fact that the issue before this Court is not one which would fall within the traditional purview of the Eighth Amendment, an examination of the common law reasons and those urged by Ford establishes there is no consistently applied rationale underlying the policy

against executing the insane.³ There are various justifications which all reflect humanitarian concerns and are in the nature of clemency; these justifications do not cancel the punishment or suggest its imposition was wrong.⁴ This general lack of agreement supports the State's position that the policy does not create an Eighth Amendment right in the individual, for how can execution of the insane be said to offend the concept of human dignity when there is no consensus as to why this is so?

³Gray v. Lucas, 710 F.2d 1048, 1054 (5th Cir. 1983) [. . . the underlying social principle . . . is unclear and not the subject of general agreement . . .]

⁴The following discussion of the common law is based upon Hazard and Louisell, Death, the State and the Insane: Stay of Execution, 9 UCLA L.Rev. 381 (1962).

Blackstone and Hale explained the rule by saying if the prisoner is sane he may urge some reason why the sentence should not be carried out. 4 Blackstone, Commentaries, 395-396 (13th Ed. 1800). Ford restates this in contemporary terms as access to the courts: a prisoner must be competent to meaningfully exercise his right of access to collateral remedies.⁵ Ford acknowledges he has fully availed himself of his judicial remedies; his pleadings allege his mental

⁵The existence of this "right" is questionable; this Court has held there is no right to counsel to pursue discretionary applications for review, Ross v. Moffitt, 417 U.S. 600 (1974), and counsel's failure to file such an application cannot constitute the basis for a claim of ineffectiveness. Wainwright v. Torna, 455 U.S. 586 (1982).

incompetency began in December, 1981, seven years after his trial. Every conceivable claim which could be advanced on Ford's behalf has been raised. The filing of any further collateral proceedings would be an abuse of process and an abuse of the writ. Rule 9(b), Rules Governing 28 U.S.C. §2254 proceedings. Ford has no standing to assert the rights of others on this issue. Fisher v. United States, 425 U.S. 391 (1976).⁶

Blackstone also stated that the prisoner's insanity is itself sufficient punishment, but this is not convincing, for at common law

⁶Moreover, since collateral proceedings review the conviction, and it is constitutionally required that a prisoner have been competent at his trial, Dusky v. United States, 362 U.S. 402 (1960), the access to the courts argument is not persuasive.

it was recognized that when the prisoner regained his sanity he was again subject to execution. This is true today, for Fla. Stat. §922.07 (1983), provides that if a prisoner is found insane, after treatment, he may be restored to sanity and executed.

Coke theorized the rule is one of humanity--a refusal to take the life of the unfortunate prisoner, Coke, Third Institute 6 (1797). This rationale has been characterized thusly:

Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for sane men, a curious reasoning that would free a man from capital punishment only

if he is not in full
possession of his senses?

Phyle v. Duffy, 34 Cal.2d 144, 159,
208 P.2d 668, 676-77 (1949) (Traynor,
J., concurring).

Coke has also suggested there is no deterrent value in executing an insane person. Ford restates this theory by alleging execution of the insane is excessive for it does not serve the penological justifications of retribution and deterrence. This argument concerns a societal interest which does not create a right in the prisoner, who is still subject to execution upon restoration to sanity. Furthermore, these interests are served. Ford is to be executed for murder, and his execution should deter potential murderers. The purpose of retribution

is to place value on the life of the victim and it exists as an alternative to private vengeance. Van den Haag, In Defense of the Death Penalty: A Legal-Practical-Moral Analysis, 14 Crim. L. Bull. 5 (1978). The societal objective of retribution, the enforcement of laws, matters more than the individual wish and is quite independent of it.

Van den Haag, Punishing Criminals (1975). In light of the fact that Ford's sanity has been determined pursuant to Fla. Stat. §922.07 (1983) the State has adequately protected society.

The theological reason advanced for the rule at common law is that the condemned should be afforded one last opportunity to make his peace

with God. The religious rationale is difficult to assess in a judicial proceeding, particularly in modern society where there is no consensus as to doctrine. Accordingly, Ford restates this principle as an entitlement to face death and die with dignity. He cites to studies which describe the deaths of terminally ill patients who are victims of circumstances beyond their control. E.g., E. Kubler-Ross, On Death and Dying (1969) ["in the following pages is an attempt to summarize what we have learned from our dying patients in terms of coping mechanisms at the time of a terminal illness", page 33]. The situation of a dying patient cannot be analogized to Alvin Bernard Ford's. Ford chose to place himself

on death row at the time he committed murder and he has had many years to ponder his fate.⁷ A death from illness is not comparable to capital punishment:

To be put to death because one's fellow humans find one unworthy to live is a very different thing from reading the end of one's journey naturally, as all men must. To be condemned, expelled from life by one's fellows, makes death not a natural event or a misfortune but a stigma of final rejection. The knowledge that one has been found too odious to live is bound to produce immense anxiety. Threatened by disease or danger, we usually feel that death is in an indecent hurry to overtake us. We appeal to friends and physicians to save us, to

⁷Certainly, he has had far more time than the few seconds he allowed his unfortunate victim.

help delay it, and we expect a comforting response. Death is the common enemy, and it calls forth human solidarity. Not for the condemned man. He is pushed across by the rest of us.

Van den Haag, Punishing Criminals, page 212 (1975).

Therefore, Ford has presented no compelling justification to support his claim that he has an individual right, protected by the Eighth Amendment's concept of human dignity, to have a stay of execution based on post-conviction insanity. The arguments Ford has advanced as to contemporary standards of decency are based on the existence of state laws which provide the insane are not to be executed. The existence of these laws does not ipso facto create an Eighth Amendment right; an

examination of the process they provide shows that in modern times, as at common law, the determination of post-sentence insanity is a matter for the executive⁸ or the prisoner's custodian,⁹ to inquire into for humanitarian reasons.

⁸Georgia Code Ann., §17-10-61; N.Y. Corr. Law, §665 (1983 Supp.); Md. Ann. Code, Art. 27 §75(c); Mass. Gen. Laws Ann., Ch. 279 §62 (1984 Supp.).

⁹Ariz. Rev. Stat. Ann., §13-4021 (1982); Ark. Stat. Ann., §43-2622 (1977); Calif. Penal Code, §3701 (1979); Conn. Gen. Stat., §54-101 (1980); Kan. Stat., §22-4006 (Supp. 1981); Miss. Code Ann., §99-19-57 (1983 Supp.); Neb. Rev. Stat., §29-2537 (1979); Nev. Rev. Stat., §176.425 (1983); New Mex. Stat. Ann., §31-14-4 (1978); Ohio Rev. Code Ann., §2949.28 (1982 Supp.); Okla. Stat. Ann., §1005 (1983); Utah Code Ann., §77-19-13(1) (1982); Wyo. Stat., §7-13-901 (1984 Cum. Supp.).

In bringing the court's view to bear on the subject, the State submits Ford has failed to establish a right under the Eighth Amendment. In Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (1978), cert. denied, 440 U.S. 976 (1979), the defendant argued that Florida's clemency procedures must be governed by the due process clause of the Fourteenth Amendment. The Fifth Circuit rejected the claim, finding the clemency power vested exclusively in the executive branch and it was a discretionary decision, not the business of judges. As authority, the court cited Sollesbee v. Balkcom, 339 U.S. 9 (1950), in which this Court held the function of determining post-conviction insanity

was properly vested in the state governor. Like clemency, the fact there is long-standing recognition that the insane should not be executed until their sanity is restored, see, Gregg v. Georgia, 428 U.S. 153, 200 n. 50 (1976), does not suffice to elevate the principle to a right etched in constitutional stone. Just as not all errors of state law in a capital sentencing proceeding are violative of the Eighth Amendment, Barclay v. Florida, 463 U.S. 939 (1983), the determination of post-conviction sanity need not be viewed as an Eighth Amendment right. As the court noted in Rhodes v. Chapman, 452 U.S. 337, 351 (1981), the courts should proceed cautiously in making Eighth Amendment judgments because revisions

cannot be made (short of a constitutional amendment) in the light of further experience.

This Court's conclusions cannot be the subjective views of the judges but should be formed by objective factors such as history and the action of state legislatures. Rhodes v. Chapman, 452 U.S. 337, 346-47 (1981). As the State has discussed, history shows that the policy against executing the insane is primarily for humanitarian reasons and it is not viewed as a right of the condemned prisoner. The existing statutes of the states provide for procedures akin to the executive clemency function.

There are valid reasons for distinguishing the determination of post-conviction insanity from earlier

stages of the judicial process.

The State, when it prosecutes someone for a crime, must prove the defendant was sane at the time of its commission, for sanity at the time of the crime is an element of guilt itself.¹⁰ Likewise, sanity at the time of trial is essential to an effective defense, and trial must be postponed if a defendant is incompetent. However, post-trial insanity commencing after judgment operates only to delay execution and so it is not deserving of the same

¹⁰The court's holding in Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1090 (1985), that an indigent defendant must have access to the psychiatric assistance necessary to prepare an effective defense at trial has no bearing on the instant case, which concerns post-conviction insanity.

protections afforded at the trial stage. Comment, Execution of Insane Persons, 23 So.Cal.L.Rev. 246 (1950).

In Roberts v. United States, 391 F.2d 991 (D.C. Cir. 1968), the court was presented with a prisoner's contention that due to his mental condition he would not be able to conform to prison regulations and so he would not become eligible for parole. He argued the prospect of a long incarceration was, as to him, cruel and unusual punishment forbidden by the Eighth Amendment. The court rejected the claim, noting there is nothing unique in the development of mental or emotional disorders as a result of imprisonment. Writing for the court, Circuit Judge (now Chief Justice) Burger quoted

Trop v. Dulles, 356 U.S. 86, 100

(1958):

While the state has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed, depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

The court concluded that since the case involved no technique "outside the bounds of these traditional penalties," the claim was without merit. Roberts v. United States, supra, at 992.

The present case, as did Roberts, involves a penalty within "traditional bounds" which has been justly imposed. Ford's Eighth Amendment claim of "right" to a

determination of post-conviction of insanity must likewise be held to be lacking in merit. "All that is good is not commanded of the Constitution and all that is bad is not forbidden by it." Palmer v. Thompson, 403 U.S. 217, 228 (1971).

II.

SHOULD THE COURT FIND THERE
IS AN EIGHTH AMENDMENT
RIGHT TO BE SANE AT THE
TIME OF EXECUTION, THE
PRESENT FLORIDA PROCEDURE
ADEQUATELY PROTECTS IT.

If this Court does conclude there is an Eighth Amendment right to be sane at the time of execution, the State maintains the procedures set forth in Fla. Stat. §922.07 (1983), adequately vindicate it. Ford invoked the statutory procedure. Three psychiatrists examined him, and all three doctors reported to the governor in writing that Ford was competent to be executed, i.e., he understood the nature of the death penalty and why it was to be imposed upon him. Ford's counsel was allowed to be present at the examination,

which, constitutionally is not even required.¹¹ There is absolutely nothing in the statute to prevent defense counsel from submitting any pertinent material to the governor. Ford excerpts a sentence from the Florida Supreme Court's decision in Goode v. Wainwright, 448 So.2d 999 (Fla. 1984), to support this portion of his argument, but the opinion states only, "He [Goode] complains about the governor's publicly announced policy of excluding all advocacy on the part of the condemned from the process of

¹¹ See, Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979); vacated on other grounds but cited with approval as to point that counsel not entitled to be present at psychiatric examination. Estelle v. Smith, 451 U.S. 454, 470, n. 14 (1981).

determining whether a person under sentence of death is insane."

448 So.2d 999. In fact, Ford's counsel did prepare materials which were submitted to and considered by the commissioners (A 103, 105), and he asserted in the District Court he had been able to submit information to rebut the conclusions of the commissioners to the governor.

(A 75-76, n. 6). ["In the 922.07 proceeding before the governor, counsel and Mr. Ford demonstrated that the conclusions of the . . . commission members . . . were flawed"].

Nevertheless, Ford insists he is entitled to a federal evidentiary determination of competency because the Florida proceeding was not conducted in a court and therefore

the presumption of correctness of 28 U.S.C. §2254(d) is inapplicable. The State maintains a determination of Ford's competency in a federal habeas corpus proceeding would be wholly inappropriate. Pursuant to 28 U.S.C. §2254(a) a person in custody pursuant to a state court judgment may apply for habeas corpus "only on the ground that he is in custody in violation of the Constitution . . . of the United States." The federal court's habeas corpus jurisdiction is defined and limited by the statute. Engle v. Issac, 456 U.S. 107, 110, n. 1 (1982); Sumner v. Mata, 449 U.S. 539, n. 2 (1981). Section 2254 is "primarily a vehicle for attack by a confined person on the legality of his custody and the

traditional remedial scope of the writ has been to secure absolute release--either immediate or conditional--from that custody."

Lee v. Winston, 718 F.2d 888, 892 (4th Cir. 1983). Ford is not attacking the validity of his judgment and sentence or the lawfulness of the Respondent's custody, since even if there is a right not to be executed while insane, once sanity is restored, the execution can proceed. The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and the traditional function of the writ is to secure release from illegal custody. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). The sole function of the writ is to grant

relief from unlawful imprisonment or custody, and it cannot be used properly for any other purpose. Hill v.

Johnson, 539 F.2d 439 (5th Cir. 1976);

Caldwell v. Line, 679 F.2d 494

(5th Cir. 1982); Delaney v. Giarrusso,

633 F.2d 1126, 1128 (5th Cir. 1981).

There is no universal right to litigate a federal claim in a federal court;

the Constitution makes no such

guarantee. Allen v. McCurry,

449 U.S. 90, 103-104 (1980); Stone

v. Powell, 428 U.S. 465 (1976).

The determination of sanity to be executed is not a stage of the criminal process, as a death-sentenced prisoner is not subject to execution until the criminal process has been completed. Events which are not critical stages of a criminal

proceeding are not subject to stringent procedural requirements to vindicate constitutional rights.

In Gerstein v. Pugh, 420 U.S. 103 (1975), this Court held that while the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest, full adversary hearing safeguards were not necessary. An informal procedure could be used and appointment of counsel was not required.

In Shadwick v. Tampa, 407 U.S. 345 (1972), this Court held municipal court clerks qualified as neutral and detached magistrates capable of issuing arrest warrants for purposes of the Fourth Amendment, and concluded not all warrant authority must reside

exclusively in a lawyer or judge.

It has been determined the Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual. Kirby v. Illinois, 406 U.S. 682 (1982). Thus, prison inmates closely confined in administrative detention while being investigated for criminal activity were held not to be entitled to the appointment of counsel, for there is no Sixth Amendment right until adversary proceedings are initiated. United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292 (1984). The right to counsel, once it has attached, concludes after direct appeal. A criminal defendant has no right to counsel to pursue discretionary applications for review,

Ross v. Moffitt, 417 U.S. 600 (1974), and counsel's failure to file such an application cannot constitute the basis for a claim of ineffectiveness. Wainwright v. Torna, 455 U.S. 586 (1982).

Therefore, any Eighth Amendment right Ford has to be sane when he is executed can be addressed in a non-judicial setting, since the issue arose after the criminal (and in this case, extensive collateral) proceedings were completed. The decision as to post-conviction sanity has been properly vested by Florida in the governor, for, as this Court held in Solesbee v. Balkcom, 339 U.S. 9 (1950), the decision bears a close affinity not to trial for a crime but to clemency powers in

general. The Constitution is satisfied because the decisionmaker is a neutral and detached official. Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971). Therefore, Ford's arguments as to the applicability of 28 U.S.C. §2254(a) are not material to the issue since there is no judicial proceeding required under the Constitution.¹²

Ford's additional argument that the Florida competency standard is inadequate because it does not require that the prisoner be able to prepare for death and consult with counsel is

¹²If this Court does find a judicial proceeding is required, the Florida courts, rather than the federal District Court, should be given the first opportunity to act. Cabana v. Bullock, ____ U.S. ____, 54 U.S.L.W. 4105, 4109 (op. filed January 22, 1986).

a repeat of his death with dignity and access to the courts arguments. As the State has pointed out earlier, Ford has litigated this case for years and he has already exercised all his rights of access to the courts. Concerning the dubious¹³ nature of Ford's claim to a right to prepare for death, the State submits the statute's requirement that the condemned prisoner understand the nature of the death penalty and why it is to be imposed on him¹⁴ satisfies this purpose.

The competency standard asserted by Ford is simply an invitation to endless litigation. The legislature

¹³See pages 33-35, supra.

¹⁴Fla. Stat. §922.07(1)

has wisely set a standard which is appropriate to the situation and left the determination to the governor.

The Florida statutory standard is the standard cited in LaFave and Scott, Handbook on Criminal Law (1972) at page 303:

The common law was quite vague on the meaning of insane in this context [time of execution], but it is usually taken to mean that the defendant cannot be executed if he is unaware of the fact that he has been convicted and that he is to be executed. Stated another way, he must be so unsound mentally as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him.

It is also the standard in at least one other state, Illinois, where the applicable statute, Illinois Rev. Stat. (1982), Ch. 38, §1005-2-3(a),

provides:

A person is unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence.

The State maintains the Eighth Amendment requires no more.

III.

PURSUANT TO CONTROLLING
PRECEDENT OF THIS COURT,
SOLESBEE v. BALKCOM,
339 U.S. 9 (1950), FLORIDA'S
PROCEDURE FOR DETERMINING
SANITY OF CONDEMNED
PRISONERS MEETS THE REQUIRE-
MENTS OF FOURTEENTH AMEND-
MENT PROCEDURAL DUE PROCESS.

Ford argues in the alternative that even if there is no Eighth Amendment right to be sane at the time of execution, Florida has created such a right and its procedure for protecting it fails to satisfy due process. The State maintains this Court's decision in Solesbee v. Balkcom, 339 U.S. 9 (1950), wherein it held a gubernatorial determination of sanity to be executed satisfies due process, is still good law and should therefore be applied as controlling precedent to reject Ford's

contentions.

The decision in Solesbee was preceded by Nobles v. Georgia, 168 U.S. 515 (1897). In Nobles, the court held the question of insanity after verdict did not give rise to an absolute right to have the issue tried before a judge and jury, but was addressed to the discretion of the judge. The court concluded the manner in which the sanity question was to be determined was purely a matter of legislative regulation. This decision led to Solesbee v. Balkcom, 339 U.S. 9 (1950), where the court held the Georgia procedure whereby the governor determined the sanity of an already convicted defendant did not offend due process:

We are unable to say that it offends due process for a state to deem its governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.

* * * * *

To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke

the aid of the most skillful class of experts on the crucial questions involved.

Id. at 12-13.

Solesbee was reaffirmed by this Court's decision in Caritativo v. California, 357 U.S. 549 (1958).

Ford argues Solesbee is no longer valid because it was decided at a time when the right/privilege distinction was thought to be determinative of an individual's constitutional rights, a concept which has since been rejected. See, e.g., Graham v. Richardson, 403 U.S. 365, 374 (1971). However, the thrust of the court's holding in Solesbee was the determination of post-conviction insanity could properly be deemed an executive function because it was akin to

clemency and it did not offend due process for the governor, with the aid of physicians, to make the determination. The court's decision did not turn on the right/privilege distinction but on the authority traditionally vested in the executive. Its analysis was adopted in Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). There the court, which in addition to Solesbee, cited Schick v. Reed, 419 U.S. 256 (1974) and Meachum v. Fano, 427 U.S. 215 (1976), held that where the governor and the cabinet, pursuant to established procedures, chose to consider whether the defendant was entitled to mercy, there was no Fourteenth Amendment due process

violation, for clemency is an executive function. In the case sub judice, it should be recognized that enforcement of the law, like clemency, is traditionally an executive function. Accordingly, the governor, who is charged with carrying out the sentence by signing the warrant, is the proper party to determine sanity in this context.

Ford also argues the decision in Gardner v. Florida, 430 U.S. 349 (1977), revisited Williams v. New York, 337 U.S. 241 (1949), and since Solesbee cited to Williams, Solesbee must be reevaluated as well. The State maintains this Court's holding in Gardner that the sentencing phase of a capital murder trial, as well as the phase on guilt or innocence,

must satisfy the requirements of the due process clause, does not call into question the continued validity of Solesbee. In both Williams and Gardner, the court was concerned with the imposition of sentence. As Justice White noted, concurring in Gardner, "The issue in this case . . . involves the procedure employed by the state in selecting persons who will receive the death penalty." Gardner v. Florida, supra, 430 U.S. at 363. By contrast, Solesbee dealt with the determination of post-sentence insanity, which is not part of the judicial process, and it is done subsequent to the imposition of sentence. It is a discretionary stage with which, as stated in Gregg v. Georgia, 428 U.S. 153, 199

(1976), the courts are not concerned. [. . . "a defendant who is convicted and sentenced to die may have his sentence commuted by the governor . . . The existence of these discretionary stages is not determinative of the issues before us . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."]
Therefore, since Fla. Stat. §922.07 (1983) is not part of the sentence imposition or process, pursuant to this Court's still controlling decision in Solesbee, it satisfies due process.

Ford's argument that Florida has created a right and it is subject to procedural due process protections is a restatement, in different terms,

of his contention that Solesbee v. Balkcom is no longer valid, since under Solesbee, Fla. Stat. §922.07 (1983), does satisfy due process.¹⁵ The State therefore reiterates its position that Solesbee is dispositive.

In any event, if the State is free to define and limit an entitlement, there seems no good reason why it should not be equally free to define the procedure that goes with that entitlement. Tribe, American Constitutional Law, page 536 (1978). An examination of Fla. Stat. §922.07 (1983), reveals that the statute does no more than provide that the prisoner

¹⁵Goode v. Wainwright, 731 F.2d 1482, 1483 (1984), [the Eleventh Circuit, citing Solesbee, held the Florida statute meets the minimum standards required by procedural due process.]

or someone on his behalf may inform the governor of his alleged insanity. This procedure has superseded the earlier Florida decisions which held an application to the trial court may be made for a determination of sanity. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984). The only expectation that has been created by first the common law and then the statute is the opportunity to petition for a sanity determination.

Ford's argument that he is entitled to the same due process protections that are applicable to a determination of competency to stand trial ignores the qualitative and obvious distinctions between the trial on guilt or innocence and a last-ditch attempt to avoid execution

many years later after all other legal efforts have failed. At trial, competency is necessary to ensure the effectiveness of the fundamental rights inherent therein such as the right to counsel, to confront and cross-examine witnesses, the decision whether to testify, etc. In short, as a matter of Fourteenth Amendment fundamental fairness, an accused must be competent at trial so he will be able to participate meaningfully in the judicial proceeding in which his life is at stake. Pate v. Robinson, 383 U.S. 375 (1966); Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 1093 (1985). It is appropriate that the court before whom he is to be tried determines his competency to stand trial.

By contrast, at the time of execution, the prisoner has exhausted his remedies and has no further avenues of relief. It is well established, as the phrase implies, that "due process" is flexible and calls for such procedural protections as the particular situation demands; not all situations calling for procedural safeguards require the same kind of procedure. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see also, Hewitt v. Helms, 459 U.S. 460 (1983). In the instant case, the statutory procedure which provides for the appointment of a commission of experts, an examination at which counsel for the prisoner may be present, and a submission of a report to the governor, is sufficient.

Due process does not always require an adversarial hearing.

Williams v. Wallis, 734 F.2d 1434, 1438 (11th Cir. 1984); Hickey v. Morris, 722 F.2d 543, 549 (9th Cir. 1983).

In Hortonville Joint School District No. 1 v. Hortonville Education

Association, 426 U.S. 482 (1976), the court held that where the state law vested a governmental function in the school board and had an interest in it remaining there, the school board's review of teacher firing decisions satisfied due process. The court further noted there is a presumption of honesty and integrity in policy-makers with decisionmaking power.

Id. at 497. Likewise in this case the legislature has enacted a statutory procedure which vests the

determination of sanity to be executed in the governor, subsequent to the receipt of a report from a commission of experts, and there is a presumption the executive has acted with integrity. This presumption is well founded in the instant case, for the commission appointed by the governor unanimously concluded Ford was sane.

Counsel for Ford and for amici criticize the fact that the mental examination was just for a half-hour period and contend this was insufficient to make an accurate diagnosis. They appear to ignore the facts that the commissioners also spoke to prison personnel who had daily contact with Ford, reviewed his prison medical records, observed the condition of his cell, and considered material

submitted by Ford's attorneys, which included reports by Doctors Kaufman and Amin (A 98-106).¹⁶ The three psychiatrists drew the conclusion that Ford understood the nature of the death penalty and why it was to be imposed upon him and reported this to the governor in writing.

¹⁶For example, Dr. Afield's report states: "I had an in depth conference with both attorneys for the inmate and reviewed the medical records that they had available. I talked at length with a variety of guards who had dealings with the inmate and reviewed the contents of Mr. Ford's writings in his cell. I discussed his medical condition with the prison psychiatrist and examined the man in the presence of all counsels and two other state-appointed psychiatrists. My examination consisted of a complete mental status examination. Subsequently, I spoke at length with attorney Burr and reviewed complete medical records from the prison, which included psychiatric evaluations and reports from several prison psychologists. I reviewed in depth Dr. Kaufman's findings."

In Barefoot v. Estelle, 463 U.S. 880 (1983), this Court refused to accept the view propounded by the American Psychiatric Association that experts cannot accurately predict the future dangerousness of a convicted criminal. The court noted there were doctors who disagreed with this position and would be quite willing to testify on the matter at a sentencing proceeding. Id., 463 U.S. 899. In this case, three doctors followed the Florida procedure for determining competency to be executed and were able to make a diagnosis. In Barefoot, this Court additionally concluded that psychiatric testimony on future dangerousness need not be based on personal examination and may be given in response to hypothetical

questions. Therefore, in the instant case, the methodology used, which included a mental examination, did not violate due process.

Further evidence that the Florida procedure provides for accurate fact finding is available from the case of Gary Eldon Alvord, a death row inmate who invoked Fla. Stat. §922.07 (1983), in November, 1984. In Alvord's case, the governor appointed two of the same three commissioners who had examined Ford, Doctors Ivory and Mhatre, to examine Alvord.

(Respondent's Appendix 1-4). Based on their reports, the governor determined Alvord was insane and committed him for treatment.

(Respondent's Appendix 5-7).

Florida's statutory procedure therefore satisfies the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976). At this point in the proceeding--post trial, post appeal, and post collateral attack, Ford's private interest is insubstantial. He has had many years to prepare for death, and he is not entitled to further access to the courts to attack his conviction.

The State has a valid and compelling interest in an end to litigation and the carrying out of its lawfully imposed sentence. In the present case, the District Court found Ford's habeas corpus petition to be an abuse of the writ (A 164), as did the dissenting judge on the Eleventh Circuit's stay panel

(A 179).¹⁷ Ford's pleadings allege his mental deterioration began in December, 1981, yet he never sought treatment, nor did he bring the matter of his alleged insanity to any court until ten days prior to his scheduled 1984 execution (A 4). The Florida statutory procedure prevents such abuses, for by permitting the governor to be the decisionmaker with the aid of an appointed commission of psychiatrists, eleventh hour postponements of executions will not be obtained by frivolous claims of incompetence.

The risk of an erroneous deprivation is negligible since the statute provides for experts to advise the

¹⁷The merits panel did not reach the issue (A 184, n. 1).

governor. In Williams v. Wallis, 734 F.2d 1434 (11th Cir. 1984), the court upheld Alabama's nonadversary procedures for determining whether insanity acquitees should be released from state mental hospitals, noting that medical professionals have no bias against release and it can be safely assumed they are disinterested decisionmakers. The court stated "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments" []. Id. at 1439.

In Gilmore v. Utah, 429 U.S. 1012 (1976), the court terminated a stay of execution, after reviewing state records, having concluded "the State's determinations of his [Gilmore's]

competence knowingly and intelligently to waive any and all such rights were firmly grounded." The concurring opinion pointed out that the state determinations were based on reports of doctors ordered by the court to examine Gilmore prior to his trial and reports of prison psychiatrists who had seen him after his conviction. Id. at 429 U.S. 1015, n. 5. Since in Gilmore the court was willing to accept state determinations of competency in a situation where the prisoner was waiving his appellate rights less than five months after committing his crimes, it does not offend due process to allow a state governor, aided by a commission of experts to determine competency to be executed many years later.

See also, Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) [dismissal of student for academic reasons requires expert evaluation and is not readily adapted to the procedural tools of judicial or administrative decision-making.] Accordingly, in this case where pursuant to Fla. Stat. §922.07 a commission of three psychiatrists examined the Petitioner, found him sane, so advised the governor, and the governor thereupon issued a death warrant, a proper balance was struck.

To accept amici's and Ford's contention that due process requires the State to provide full adversarial judicial proceedings, subject to appellate review, is to invite never-ending litigation. Ford's execution

was stayed on May 30, 1984. By the time this case is resolved, two more years will have gone by. The concern expressed by this Court long ago in Nobles v. Georgia, 168 U.S. 398, 405-406 (1897), is just as valid today:

If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue . . . it would be wholly at the will of the convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

The State urges this Court to reaffirm Solesbee v. Balkcom, supra, by holding that the Florida procedure for determining competency to be

executed satisfies procedural due process.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Respondent respectfully requests that the decision of the Circuit Court of Appeals for the Eleventh Circuit be affirmed.

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APPENDIX



A-1

STATE OF FLORIDA

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER NUMBER 84-214

(Commission to Determine Mental
Competency of Inmate)

WHEREAS, the Governor has been informed that GARY ELDON ALVORD, an inmate at Florida State Prison, under sentence of death, may be insane, and

WHEREAS, pursuant to Section 922.07, Florida Statutes, it is necessary to appoint a Commission of three competent, disinterested psychiatrists to inquire into the mental condition of the aforesaid inmate, and to suspend the execution of the death sentence imposed upon said inmate during the course of the medical examination;

NOW, THEREFORE, I, BOB GRAHAM,
as Governor of the State of Florida,
by virtue of the authority vested in
me by the Constitution and Laws of the
State of Florida, specifically Section
922.07, Florida Statutes, do hereby
promulgate the following Executive
Order, effective immediately:

1. The following persons, who
are competent, disinterested
psychiatrists, are hereby appointed
as a Commission to examine the mental
condition of GARY ELDON ALVORD, an
inmate at Florida State Prison,
pursuant to Section 922.07, Florida
Statutes:

1. Peter B.C.B. Ivory, M.D.
2. Gilbert N. Ferris, M.D.
3. Dr. Umesh M. Mhatre

2. The above-named psychiatrists as and constituting the "Commission to Determine the Mental Condition of GARY ELDON ALVORD" shall examine GARY ELDON ALVORD to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him as required by Section 922.07. The examination shall take place with all three psychiatrists present at the same time. Counsel for the inmate and the State Attorney may be present but shall not participate in the examination in any adversarial manner.

3. The psychiatric examination shall be conducted expeditiously. Upon completion of the examination, said Commission shall report to me their findings.

4. The expenses involved in this examination shall be borne by the Department of Corrections.

5. The execution of the sentence imposed upon GARY ELDON ALVORD by the Circuit Court of the 13th Judicial Circuit, Hillsborough County, on April 9, 1974, is hereby suspended pending the outcome of the examination of the mental condition of said inmate.

IN TESTIMONY WHEREOF,
I have hereunto set
my hand and caused
the Great Seal of the
State of Florida to be
affixed at Tallahassee,
the Capitol, this
20th day of November,
1984.

/s/ Bob Graham
GOVERNOR

ATTEST:

/s/ George Firestone
SECRETARY OF STATE

A-5

STATE OF FLORIDA

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER NUMBER 84-222

(Amendment of Executive Order 84-214)

WHEREAS, in accordance with the provisions of Section 922.07, Florida Statutes, Executive Order 84-214 was entered appointing three competent, disinterested psychiatrists (the "Commission") to examine the mental condition of GARY ELDON ALVORD, an inmate at Florida State Prison under sentence of death, and

WHEREAS, the Commission has completed its examination of the said GARY ELDON ALVORD, and, in reviewing its report the Governor has determined that GARY ELDON ALVORD is not mentally competent under the

terms of Section 922.07, and

WHEREAS, Section 922.07 requires that an inmate under sentence of death found to be incompetent must be committed to the state hospital for the insane until such time as the inmate is found to be competent, and

WHEREAS, there is no reason for the continuation of the Commission since the purpose for which it was created has been completed; and in accordance with Section 922.07, Florida Statutes,

NOW, THEREFORE, I, BOB GRAHAM, as Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and laws of the State of Florida, do hereby

promulgate the following executive order:

1. GARY ELDON ALVORD is remanded to the Florida State Hospital for the insane at Chattahoochee where he shall be kept in secure custody.

2. Peter Ivory, M.D., Gilbert Ferris, M.D., and Umesh Mhatre, M.D., are hereby relieved of all further duties and responsibilities under Executive Order 84-214.

3. The stay of execution of the sentence imposed upon GARY ELDON ALVORD, granted by said Executive Order 84-214, remains in effect until further order pursuant to Section 922.07.

A-8

IN TESTIMONY WHEREOF,
I have hereunto set
my hand and caused
the Great Seal of the
State of Florida to
be affixed at
Tallahassee, the
Capitol, this 29th
day of November,
1984.

/s/ Bob Graham
GOVERNOR

ATTEST:

/s/ George Firestone
SECRETARY OF STATE

APR 10 1988

ROBERT E. SPANIEL, JR.
CLERK

10
No. 85-5542

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, OR CONNIE FORD
INDIVIDUALLY, AND AS NEXT FRIEND ON BEHALF OF
ALVIN BERNARD FORD, *Petitioner*,
v.

LOUIE L. WAINWRIGHT, Secretary Department of
Corrections, *Respondent*.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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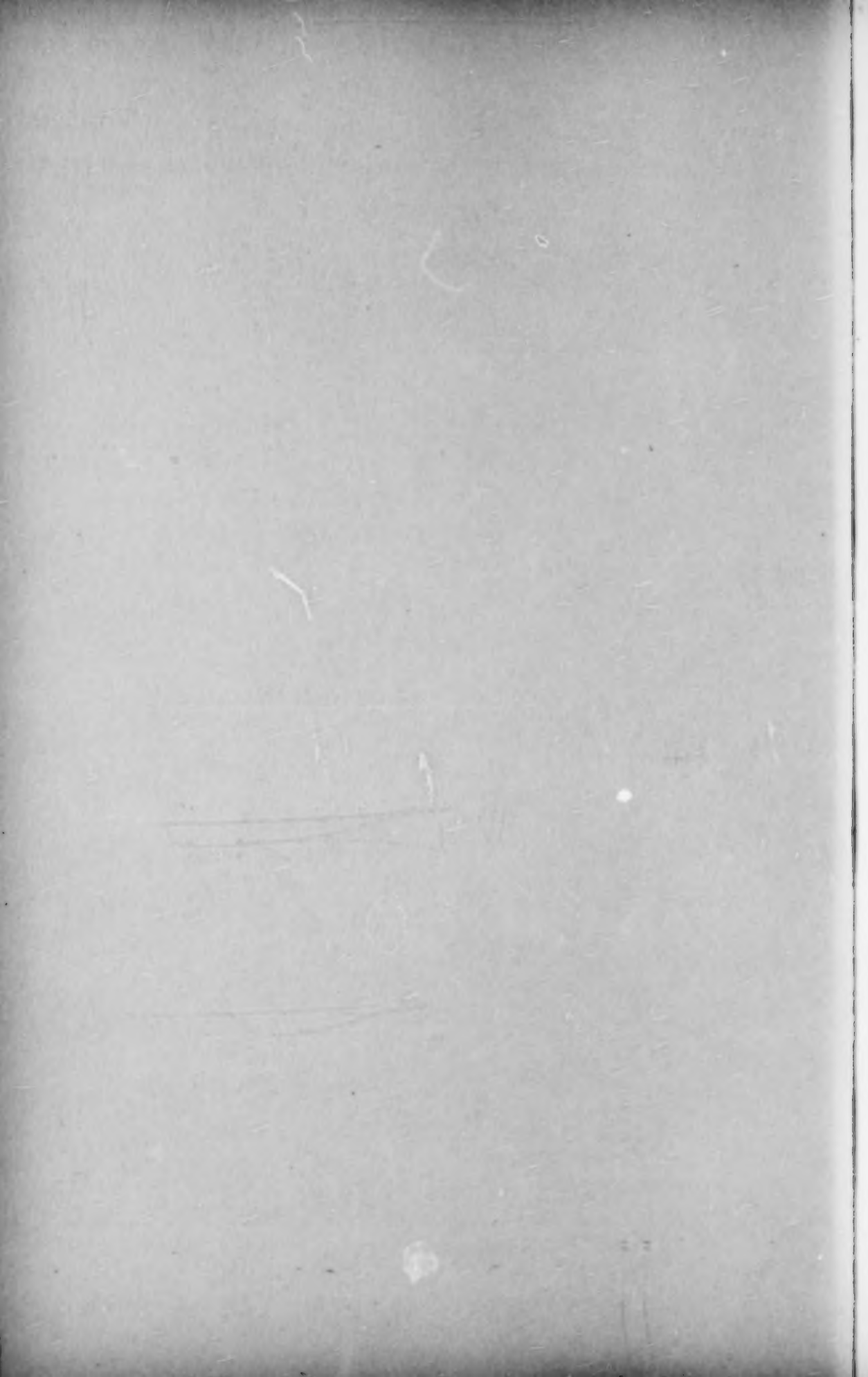


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ARGUMENT

In reply to the Brief of Respondent, Mr. Ford will make three points. First, there was no abuse of the writ, and respondent's implication that there was is inaccurate and without any record support. Second, respondent's portrayal of the Florida governor as a "neutral and detached" factfinder, capable of making a reliable determination of competency to be executed, is flatly contradicted by the practice of the governor in making competency determinations. Third, federal habeas corpus provides an entirely appropriate remedy for Mr. Ford's claim, even though he has not further challenged the propriety of his conviction or sentence.

1. Respondent has not expressly argued, as he did in the lower courts, that Mr. Ford has abused the writ. Nevertheless he has raised the spectre of abuse by asserting that "Ford's pleadings allege his mental deterioration began in December, 1981, yet he never sought treatment, nor did he bring the matter of his alleged insanity to any court until ten days prior to his scheduled 1984 execution." Brief of Respondent, at 75. Respondent's implication is clear: Counsel for Mr. Ford knew about Mr. Ford's incompetency in sufficient time to raise it in his first habeas proceeding but instead "saved" the issue for a successive petition, and in order to make the issue stronger, sought no treatment for Mr. Ford which might have the effect of restoring his competency.

As demonstrated in the Statement of the Case in Mr. Ford's opening brief, respondent's implication is unwarranted and has no support whatsoever in the record.

Mr. Ford's first habeas petition was filed on December 1, 1981.¹ No claim was made concerning competency—to

¹ The information concerning the dates of Mr. Ford's first habeas proceeding is from the docket sheet for that proceeding, maintained by the United States District Court for the Southern District of Florida as No. 81-6663-Civ-NCR. If needed, counsel will provide a copy of the docket sheet for the Court.

be tried or executed—nor had any such claim been made in any prior proceeding in Mr. Ford's case. JA 142. Moreover, counsel for Mr. Ford during his first habeas proceeding knew of no factual basis for such a claim at that time. *Id.* On December 7, 1981, the district court denied the writ and Mr. Ford filed his notice of appeal.² Thus, during the pendency of Mr. Ford's first petition in the district court, there was no reason for Mr. Ford's competency to be raised as a ground for habeas corpus relief. Respondent's implication that the issue could have been raised in that short-lived proceeding is plainly without basis.

During the pendency of Mr. Ford's appeal, gradual changes did begin to appear in his behavior. JA 17-34. In a letter received within the week after the notice of appeal was filed, counsel for Mr. Ford were provided the first hint that Mr. Ford was becoming ill: He wrote that the staff of a local radio station had been talking to him in their broadcasts over the past few weeks. JA 21-23. Mr. Ford's behavior and writing gradually became more peculiar thereafter. JA 23-24. Because of this, counsel asked Dr. Jamal Amin, a psychiatrist who had previously evaluated Mr. Ford in connection with clemency proceedings, to resume seeing Mr. Ford "for therapeutic purposes." JA 60. Dr. Amin saw Mr. Ford for several months thereafter, *id.*, and came to the conclusion that Mr. Ford was suffering from paranoid schizophrenia. JA 88-92. Dr. Amin recommended treatment with psychotropic medication, JA 92, but despite efforts by counsel to obtain such treatment, the prison medical staff refused. JA 147. They "took the position that there was nothing wrong with Mr. Ford." *Id.* Respondent's assertion that treatment was never

² The notice of appeal was filed immediately, because the district court also refused to stay Mr. Ford's execution, requiring immediate application to the court of appeals.

sought for Mr. Ford, is, accordingly, flatly contradicted by the record.

Even though Mr. Ford continued to deteriorate through the remainder of 1982 and through 1983, counsel had no notice that his illness had compromised his ability to understand the nature and effect of his death sentence or why he was to be executed until mid-October, 1983. JA 147-48. During an interview at that time, Mr. Ford manifested the first signs that his psychotic thought processes had begun to affect his competency when he began explaining how "Ford v. State" had overturned his death sentence. JA 148. Within one week of that interview, counsel commenced the § 922.07 proceeding on Mr. Ford's behalf. *Id.* Thus, counsel immediately pursued state remedies upon learning facts suggesting a claim of incompetency. There was no "holding back" of an issue until a death warrant was signed, as implied by respondent.

Mr. Ford's request for a stay of execution and treatment under § 922.07 was not decided by the Florida governor for six months thereafter. During this time, if Mr. Ford had filed proceedings respecting his competency in the state or federal courts, the court of appeals found that "he would most probably have been met with a ruling that [his] sole relief was pursuant to Florida Statute § 922.07." JA 169. Accordingly, Mr. Ford's pursuit of relief under § 922.07 was necessary before he could initiate judicial proceedings.

Mr. Ford's § 922.07 proceeding ended when the governor signed a death warrant on April 30, 1984. JA 12. Three weeks thereafter, Mr. Ford filed proceedings in the state courts, JA 1, and less than a week after that, in the federal courts, JA 1-2.³

³ Counsel for Mr. Ford was unable to initiate judicial proceedings

Thus, while it is true that Mr. Ford did not initiate any judicial proceedings concerning his competency until ten days before his scheduled execution, the implication by respondent that Mr. Ford, by that "late filing, abused the writ, is wholly unwarranted. As the uncontradicted record demonstrates, counsel for Mr. Ford acted in a timely fashion to raise the competency issue in the only forum that was available as soon as it became apparent. Moreover counsel did nothing to hold back or enhance the issue until it was "ripe." To the contrary counsel sought appropriate treatment for Mr. Ford which, if provided, might have maintained his competency. Respondent's own employees, however, refused to provide that treatment. On this record, there is no abuse of the writ.

2. Respondent has portrayed the Florida governor as a "neutral and detached official" capable of making reliable competency determinations based on the advice of the psychiatrists he appoints to evaluate the condemned. Having bolstered the governor's portrait with the "presumption of honesty and integrity" accorded "policy-makers with decisionmaking power," respondent urges the Court to find the executive decision-making process of § 922.07 adequate to protect either the Eighth Amendment right or the state-created right to be spared from execution when incompetent.

With this portrayal, respondent has obscured the fundamental defects in the governor's competency-determination procedure, which—even if the governor acts with the integrity of a neutral and detached official—

immediately after the signing of the death warrant, because at that time all of counsel's resources were devoted to staying the execution of another client, James Adams. Mr. Adams was executed on May 10, 1984. Mr. Ford's pleadings were prepared and filed by May 21, 1984.

prevent the governor from making sufficiently reliable determinations of competency to satisfy the Eighth or Fourteenth Amendment.

To resolve any residual doubt about this, the Court should look once again at the decision-making process followed by the governor under § 922.07. The governor appoints three psychiatrists to examine the condemned and report their findings to him. The condemned is allowed to have counsel present during the psychiatric examination, but the governor by executive order prohibits counsel from participating in the examination "in an adversarial manner." *See* Brief for Petitioner, at 30 n. 29. After the examination is over, there is no further role allowed for the advocate for the condemned.

To be sure, counsel for Mr. Ford tried to play a role thereafter: Counsel mailed to the governor a written response to the appointed psychiatrists' reports, and provided as well the reports of Dr. Kaufman and Dr. Amin along with an explanation as to why their opinions were more reliable. JA 149.⁴ However, the office of the governor consistently informed Mr. Ford's counsel that they were "not sure" the governor would consider any of the information or argument that counsel submitted. *Id.* Counsel never had the opportunity to address the governor concerning these matters, to question the appointed experts before the governor, or to present to the governor the testimony of Dr. Kaufman, Dr. Amin, Dr. Halleck, and Dr. Barnard (*see* Brief for Petitioner, at 3-6). In short, counsel for Mr. Ford had no assurance that any of the competing expert views about Mr. Ford's illness and its effect on his

⁴ It was in this written response that counsel for Mr. Ford believed they had rebutted the conclusions of the appointed psychiatrists. *See* reference to this in Brief of Respondent, at 46.

competency were even known, much less considered, by the governor.⁵

The Court has *never* approved a rights-determining process of this sort—in any context in which any kind of right is determined—as consistent with due process. At a minimum the Court has required that *both sides* to the controversy be heard by the factfinder. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 579-81 (1975) (citing cases); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“[t]he fundamental requisite of due process of law is the opportunity to be heard”); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 531, 534 (1864) (“[p]arties whose rights are to be affected are entitled to be heard . . .”). The Florida governor, however, determines the life-and-death issue of competency *without* hearing from the condemned. In the case in which there is no material dispute among the experts, such a procedure may be satisfactory.⁶ But in the case in which there is a material dispute among the experts, such a procedure

⁵ Mr. Ford was able to present the views of Dr. Kaufman and Dr. Amin to two of the three appointed psychiatrists (the third, Dr. Ivory, refused to consider them). These psychiatrists *adopted* Dr. Kaufman's and Dr. Amin's views that Mr. Ford was psychotic, but disagreed that he was also incompetent. JA 102-06. Yet the appointed psychiatrists provided no explanation of this—nor did they even note Dr. Kaufman's opinion as to competency—in their reports to the governor. *Id.* Thus, the competing views concerning competency were not communicated to the governor by the appointed psychiatrists.

⁶ Indeed where there is no dispute among experts, competency issues—including trial competency and competency to waive appeal—are routinely and appropriately decided by non-adversarial processes. *See, e.g., Gilmore v. Utah*, 429 U.S. 1012 (1976), cited by respondent, which approved summary determinations of competency by the state courts where there was no dispute among the experts as to the defendant's competency.

cannot—and never has been held by the Court to—comport with due process.

Such a process of rights-determination is, therefore, not a process that enables even a “neutral and detached” factfinder to find facts reliably. While such a process may be satisfactory in some nations, it is not in ours, for ours is one that, first and foremost, trusts “the adversary process . . . to sort out the reliable from the unreliable evidence and opinion. . . .” *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983). By failing to provide for the consideration of the side of the condemned, Florida’s 922.07 procedure is at odds with the fundamental requisite of due process of law.

3. Respondent has argued that the determination of Mr. Ford’s competency in a federal habeas corpus proceeding “would be wholly inappropriate,” because “Ford is not attacking the validity of his judgment and sentence or the lawfulness of the Respondent’s custody, since even if there is a right not to be executed while insane, once sanity is restored, the execution can proceed.” Brief of Respondent, at 47-48. Respondent’s argument is misplaced, however, for it misunderstands the nature of federal habeas corpus.

At bottom, respondent’s argument is premised on Mr. Ford’s failure to attack his conviction or sentence. To respondent, Mr. Ford’s effort to prevent his execution when he is incompetent because of the unconstitutionality of such an execution is not enough of a remedy to seek in federal habeas corpus. Thus, respondent argues that “the traditional function of the writ is to secure *release* from illegal custody,” *id.*, at 48 (emphasis in original)—which requires attack upon the conviction or sentence. Habeas corpus has never been so limited.

The jurisdictional basis for the federal writ is 28 U.S.C. § 2241, which authorizes the issuance of the writ whenever any person is in custody in violation of the Constitution of the United States, whether or not the purported authority for that custody is a judgment of conviction and sentence. The 1867 statute which survives today as § 2241(c)(3) and extends federal habeas corpus protection to any person "in custody in violation of the Constitution" was not originally conceived, and never has been conceived, as exclusively—or even principally—providing a means for attacking state-court judgments.⁷ It is a procedure for attacking the legality of the petitioner's confinement. It may be maintained when the petitioner is confined under other authority than a judgment of conviction, *e.g.*, *United States v. Hamilton*, 3 U.S. (Dall.) 17 (1975); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99-100 (1807), and for purposes other than attacking such a judgment, *e.g.*, *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).⁸ Thus, the Court has observed,

⁷ See generally Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 882-89 (1965)/

⁸ The irony in Wainwright's position is that historically the writ did not lie at all for the purpose of attacking a judgment of conviction or a sentence. When a respondent's return to the writ showed that the petitioner was held by virtue of a judgment of a court having jurisdiction, the inquiry on habeas corpus ended. *E.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 650 (1830); *Moore v. Dempsey*, 261 U.S. 86 (1923). See generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). The emergence of habeas corpus as a post-conviction remedy available to question the legality of a conviction and sentence is a recent principle resulting from the expansion of the original concept of "lack of jurisdiction." *E.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 872 (1873); *Johnson v. Zerbst*, 304 U.S. 458 (1938). See generally *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977).

[W]hile our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter* [T]he broad power of the federal courts . . . summarily to hear the application and to 'determine the facts, and dispose of the matter as law and justice require,' is hardly characteristic of an appellate jurisdiction. Habeas corpus lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him

Fay v. Noia, 372 U.S. 391, 430-31 (1963). *Accord Waley v. Johnston*, 316 U.S. 101, 104-05 (1942); *Hawk v. Olson*, 326 U.S. 271, 274-76 (1945). In *Townsend v. Sain*, 372 U.S. 293 (1963) the Court further iterated that the "function on habeas corpus . . . is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest of allegations. . . . [T]he power of inquiry on federal habeas corpus is plenary." *Id.* at 311-12.

The question of whether Mr. Ford's claim is appropriately determined in federal habeas corpus therefore does not turn on whether he is attacking his conviction and sentence. It turns solely on whether he is "in custody in violation of the Constitution" within the meaning of § 2241(c)(3) and § 2254(a), if as he asserts, he is being confined for the purpose of executing him and his execution would be unconstitutional. It has long been settled that a habeas petitioner is "in custody in violation of the Constitution" if he is being confined for purposes of subjecting him to *trial* that would violate his federal rights. *See, e.g., In re Loney*, 134 U.S. 372 (1890); *In re Neagle*, 135 U.S. 1 (1890); *Hunter v. Wood*, 209 U.S. 205 (1908). There is no conceivable ground, and Wainwright has offered none, for distinguishing the case of a petitioner

held for the purpose of subjecting him to a federally unconstitutional *execution*.⁹

Federal habeas corpus is thus an entirely appropriate vehicle for the determination of Mr. Ford's claims.

CONCLUSION

For these reasons as well as for the reasons advanced in the Brief for Petitioner, petitioner respectfully request that the Court vacate the judgment of the Court of Appeals and remand as requested in his opening brief.

Respectfully submitted,

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⁹ See also *Preiser v. Rodriguez*, 411 U.S. at 487 (holding that habeas corpus is available to attack future confinement that is unconstitutional).



85-5542

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,
v.

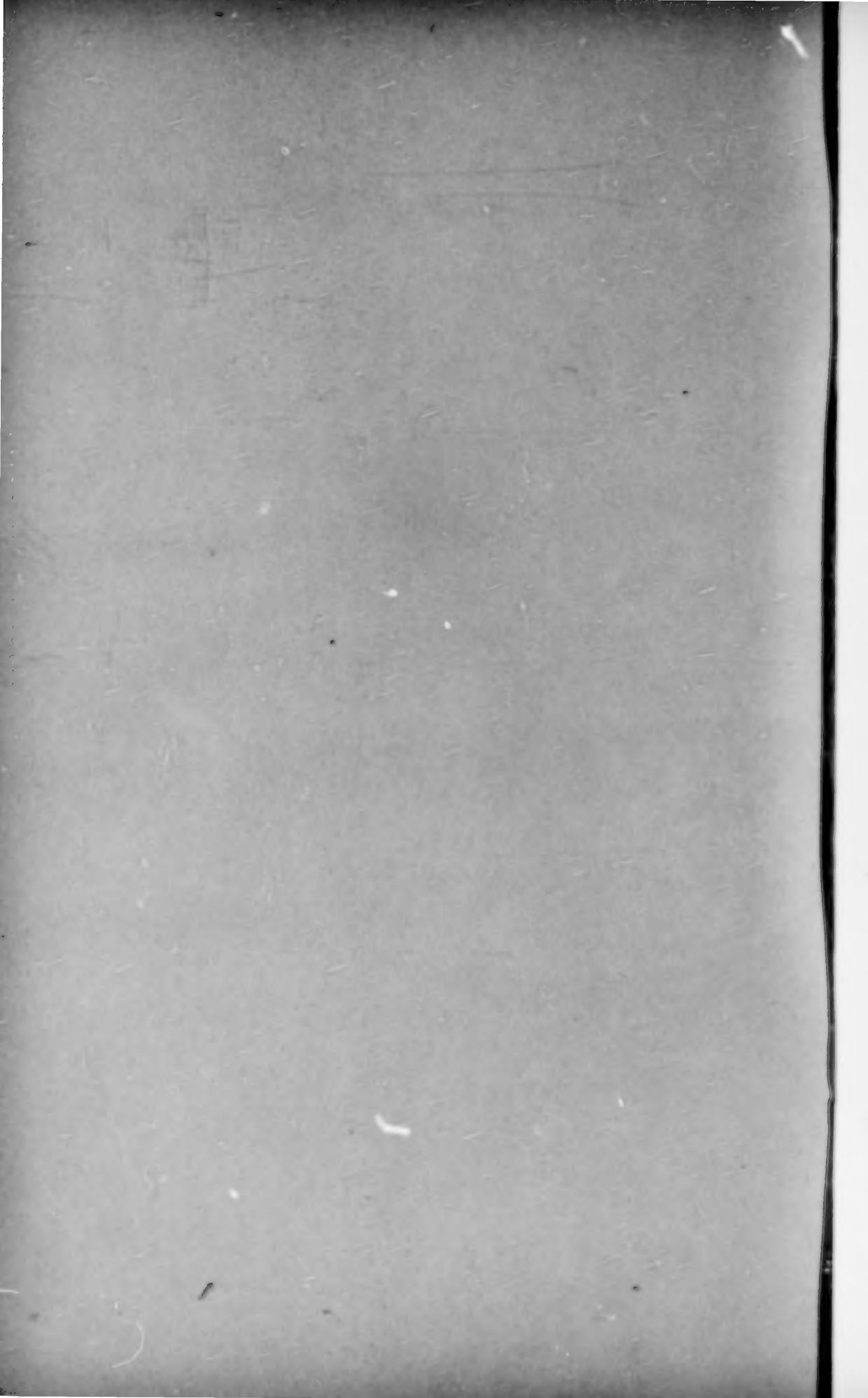
LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF OF *AMICI CURIAE*
AMERICAN PSYCHOLOGICAL ASSOCIATION
AND
FLORIDA PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER**

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Pursuant to Rule 36.3 of the Rules of this Court, the American Psychological Association (hereafter "APA") and the Florida Psychological Association (hereafter "FPA") move for leave to file the attached brief *amici curiae*. Although Petitioner consented to the filing of this brief, Respondent denied consent, thereby necessitating the filing of this Motion.

The APA, a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universi-

ties in the United States. The purpose of APA, as set forth in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare" A substantial number of APA's members are concerned with clinical and forensic psychology, including the collection of data and the development of research, and engage regularly in the evaluation of the mental condition of criminal offenders.

The FPA, with over 700 members, represents the majority of psychologists in Florida and is affiliated formally with the APA. The work of FPA's members encompasses basic and applied research, teaching, and a myriad of mental health services to hospitals, courts, clinics, schools, and the community at large. Many of Florida's psychologists offer expert testimony in court proceedings in which an individual's mental or emotional state is an issue. An even larger number are involved in the study, assessment, and treatment of mental and emotional disorders and the effects of such disorders on human behavior and cognitive abilities. In this way, Florida psychologists, like psychologists nationally, bring unique qualifications to matters bearing on the case at hand. Because this case originated in Florida, and because Florida psychologists are committed to the promotion of public welfare, FPA, representing psychology in Florida, joins APA as co-amicus.

The APA has participated as amicus in many cases in this Court involving mental health issues, including *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded residents of state hospitals); *Mills v. Rogers*, 457 U.S. 291 (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion counseling by non-physicians); and *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) (indigent defendant's right to assistance from a mental health professional). So far this Term, the APA has filed

amicus briefs in *Thornburgh v. American College of Obstetricians and Gynecologists*, No. 84-495; *Lockhart v. McCree*, No. 84-1865; and *Smith v. Sielaff*, No. 85-5487.

APA contributes *amicus* briefs to this Court only where the APA has special knowledge to share with the Court. APA regards this as one of those cases. In this instance, APA and FPA wish to inform the Court about the methodologies of psychological evaluations and the need for and use of expert testimony in post-sentencing competency proceedings. APA and FPA believe this important and relevant information will not be provided by the parties and will be of assistance to the Court in deciding this case.

Respectfully submitted,

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**BRIEF OF AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
AND
FLORIDA PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set out in the attached Motion for Leave to File Brief Amici Curiae, at pp. i-iii, *supra*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises two related issues regarding the extent to which the Eighth and Fourteenth Amendments prohibit the execution of condemned prisoners who are presently mentally incompetent, and, assuming such a prohibition, the minimum procedural safeguards that must be observed in determining such individuals' competency to be executed. Determination of appropriate procedures for competency evaluations of condemned prisoners involves recognition and understanding of the roles played by mental health professionals in this context.¹ Because

¹ Throughout this brief, *amici* use the term "mental health professional" to refer to professional psychologists, psychiatrists and other clinicians qualified by law to evaluate and present opinion testimony on the mental health issues relevant to capital cases. Expert testimony in this area by psychologists, for example, has been admissible in most jurisdictions since the 1940s, see *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (*en banc*); *Hidden v. Mutual Life Insurance Co.*, 217 F.2d 818 (4th Cir. 1954); and *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940); see generally T. BLAU, *THE PSYCHOLOGIST AS EXPERT WITNESS* (1984); D. SHAPIRO, *PSYCHOLOGICAL EVALUATION AND EXPERT TESTIMONY* (1984), and has met with almost unanimous endorsement by commentators. See Bonnie and Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case For Informed Speculation*, 66 VA. L. REV. 427 (1980); Lassen, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A. J. 239 (1964); Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L. J. 82 (1969); Louisell, *The Psychologist in Today's Legal*

of amici's strong interest and expertise in the various methodologies for cognitive assessment that are integral components of all competency evaluations, including those

World, 39 MINN. L. REV. 235 (1955); Nash, *Parameters and Distinctiveness of Psychological Testimony*, 5 PROF. PSYCHOL. 239 (1974); Pacht, Kuehn, Bassett & Nash, *The Current Status of the Psychologist as an Expert Witness*, 4 PROF. PSYCHOL. 409 (1973); Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26-36 (G. Cooke, ed. 1980); Note, *Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity*, 8 VILL. L. REV. 119 (1962); Comment, *The Psychologist as an Expert Witness*, 15 KAN. L. REV. 88 (1966). For further discussion of this point, see Briefs for Amicus Curiae American Psychological Association in *Smith v. Sielaff*, No. 85-5487; and *Ake v. Oklahoma*, No. 83-5424.

Although some of the Court's decisions in cases involving mental health issues have referred to psychiatrists and not psychologists or other appropriately trained and licensed mental health professionals, see, e.g., *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Estelle v. Smith*, 451 U.S. 454 (1981); and *Parkam v. J.R.*, 442 U.S. 584 (1979), other decisions properly have recognized that psychologists stand on an equal footing with psychiatrists. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982) ("professional decisionmaker" includes persons with "appropriate training" in "psychology"); *Blue Shield v. McCready*, 457 U.S. 465 (1982) (health plan subscriber denied reimbursement for psychologist's fees has standing to sue for conspiracy to exclude psychologists from psychotherapy market); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) ("[the state]'s reliance on the opinion of a designated physician or psychologist . . ."); and *Addington v. Texas*, 441 U.S. 418, 429 (1979) (" . . . which must be interpreted by expert psychiatrists and psychologists"). Amici assume that holdings referring solely to psychiatrists were not intended to imply that rules deemed appropriate in those cases for psychiatrists would be inappropriate for psychologists or other appropriately trained and licensed mental health professionals. However, these ambiguities have led lower courts to read *Ake* and analogous cases too narrowly. See, e.g., *Lindsey v. State*, 254 Ga. 444, 330 S.E. 2d 563 (1985) (*Ake* not satisfied by providing defense with access to examination by a mental health expert other than a psychiatrist). To dispel any confusion that these ambiguities may have engendered among lawyers and judges on this point, amici urge the Court to use a more neutral and descriptive phrase such as "mental health professional." This phrase has been adopted

provided under Florida law,² *amici* believe that their views regarding this latter issue will be useful to the Court's deliberations.

Although *amici* do not address in this brief the question whether States are prohibited by the Eighth Amendment's prohibition against cruel and unusual punishment, or by the Due Process Clause of the Fourteenth Amendment, from carrying out the death penalty against individuals who are presently incompetent, for the purpose of presenting their argument, *amici* will assume that, whether as a substantive constitutional right or as an interest entitled to federal due process protections, Florida constitutionally may not execute mentally incompetent individuals.³

Under either the enhanced reliability standard for imposing capital punishment under the Eighth Amendment or the procedural due process standards of the Fourteenth Amendment, the procedures followed by the State of Florida in evaluating Petitioner's competency to be

by the American Bar Association, on the recommendation of an interdisciplinary task force composed of lawyers, psychologists, psychiatrists and other mental health professionals, including formal representatives of the American Psychological Association and the American Psychiatric Association, in its recently adopted Criminal Justice Mental Health Standards. See ABA Standards for Criminal Justice (1984), Standard 7-1.1 *et seq.*

² Fla. Stat. § 922.07(2) provides that a condemned prisoner is incompetent to be executed upon a determination by the Governor, after professional examination of the prisoner, that the prisoner lacks "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him." This test requires the assessment of primarily cognitive abilities.

³ *Amici's* decision not to address the question *whether* Petitioner has a constitutional right not to be executed while mentally incompetent reflects *only* their judgment that, in light of their special expertise, *amici's* views would be most useful to the Court's deliberations on the issues addressed herein. Nevertheless, *amici* believe that the arguments presented to the Court by Petitioner's counsel on the underlying constitutional issues are soundly based in the prior holdings of the Court.

executed were inadequate. Although Petitioner does not now challenge the validity of his conviction and sentencing, because of the consistent recognition by this Court of the "qualitative difference" between the penalty of death and other punishments, *California v. Ramos*, 463 U.S. 992, 998 (1983); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), the requirement that procedural safeguards be observed to ensure accuracy and reliability in the guilt and sentencing phases of capital proceedings should be extended to proceedings in the post-sentencing phase in which competency for execution is evaluated.⁴

Because of the critical role that adversarial debate plays in the "truth-seeking" process, *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (plurality opinion), amici urge this Court, whenever there is reasonable cause to believe that a condemned prisoner lacks the mental competency to be executed, and there is a factual dispute as to that issue, to require a full and fair adversarial hearing on the issue of his or her competency.⁵ Amici further urge the Court's recognition, as a requirement of due process, of the effective assistance of mental health professionals, and the appointment of such professionals in the case of indigents, to conduct appropriate examinations of condemned prisoners and to assist them and their attorneys in evaluating and preparing all issues relevant to the accurate determination of their present competency to

⁴ See also *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion) (and cases cited therein). See generally *Ake v. Oklahoma*, 105 S.Ct. 1087, 1099 (1985) (Burger, C. J., concurring).

⁵ Because the constitutional right not to be executed while incompetent is no less important than the right not to be tried while incompetent, the threshold inquiry for requiring a hearing on a condemned prisoner's competency to be executed should be whether there is "reasonable cause" to question, or "sufficient doubt" as to, the prisoner's competency. See generally *Drope v. Missouri*, 420 U.S. 162, 173, 180 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

be executed. Finally, *amici* urge the Court to require written statements by decisionmakers specifying the facts relied upon in determining a condemned prisoner's competency to be executed, to ensure that proper procedural and substantive standards are observed by the State in competency proceedings. The procedures provided by *Fla. Stat.* § 922.07 for determining the competency of condemned prisoners failed in all of these respects to provide Petitioner adequate protection of his constitutional right not to be executed at this time.

Apart from the general right of condemned prisoners in Petitioner's circumstances to the assistance of a mental health professional, the mental status examination of Petitioner which was conducted by the psychiatrists appointed by the Governor pursuant to *Fla. Stat.* § 922.07 failed to meet the relevant professional standards of mental health professionals engaged in forensically-oriented clinical evaluations.

As a result of these procedural inadequacies and professional deficiencies, the determination that Petitioner is competent to be executed fails the enhanced reliability and heightened procedural fairness standards of the Eighth and Fourteenth Amendments.

ARGUMENT

I. CONDEMNED PRISONERS OF QUESTIONABLE MENTAL COMPETENCY MAY NOT BE EXECUTED WITHOUT FIRST HAVING THEIR COMPETENCY DETERMINED THROUGH AN ACCURATE AND RELIABLE FACTFINDING PROCEEDING.

The question presented by this case is whether the constitutional requirement that adequate procedural safeguards be observed to ensure accurate and reliable determinations in the guilt and sentencing phases of capital punishment should be extended to proceedings where the State determines a condemned prisoner's competency

to proceed with the execution. This Court has recognized consistently the special nature of capital cases and has construed the Constitution to require adherence to the highest standards of procedural fairness in imposing the death penalty. Because the death penalty is "unique in its severity and irrevocability," and because of the fundamental nature of the individual interest that is at stake in death penalty proceedings, the Court has imposed procedural standards designed to minimize the possibility of erroneous determinations in such proceedings. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion), citing *Furman v. Georgia*, 408 U.S. 238, 286-91, 306 (1972) (concurring opinions of Brennan and Stewart, JJ.). See, e.g., *Ake v. Oklahoma*, 105 S.Ct. 1087, 1099 (1985) (Burger, C.J., concurring in judgment); *Lockett v. Ohio*, 438 U.S. at 604; *Gardner v. Florida*, 430 U.S. at 357; *Woodson v. North Carolina*, 428 U.S. at 305.

These standards require individualized consideration of all factors relevant to the determination to impose capital punishment as a means of ensuring that "the death penalty is not meted out arbitrarily or capriciously," but rather in a consistent and reasoned manner. *California v. Ramos*, 463 U.S. at 992; *Lockett v. Ohio*, 438 U.S. at 601; *Gregg v. Georgia*, 428 U.S. at 188-89.⁶ The Court has required further that adequate procedural safeguards be followed in capital proceedings to ensure the accuracy

⁶ Because "the imposition of death by public authority is so profoundly different from all other penalties, . . ." *Lockett v. Ohio*, 438 U.S. at 605 (Burger, C. J.) (emphasis added), individuals subject to capital punishment must be permitted to present any mitigating evidence that is relevant to the decisionmaker's determination of the appropriateness of capital punishment in their particular cases, and such evidence must be considered by the decisionmaker. *Woodson v. North Carolina*, 428 U.S. at 304. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Without informed decisionmaking, "the system cannot function in a consistent and rational manner." *Gregg v. Georgia*, 428 U.S. at 189, quoting the American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.1(a), Commentary, p. 201 (App. Draft 1968).

of the information used by decisionmakers and the reliability of the determination that "death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 304, 305.

Although the Court has not had occasion to address the specific applicability of these procedural requirements to post-sentencing competency proceedings in light of contemporary Eighth and Fourteenth Amendment standards,⁷ the constitutional values of consistent, reasoned determinations and enhanced reliability in imposing capital punishment are no less compelling in the context of post-sentencing competency determinations.⁸ Chief Jus-

⁷ The court of appeals' reliance on *Solesbee v. Balkcom*, 339 U.S. 9 (1950), and *Caritativo v. California*, 357 U.S. 549 (1958), is misplaced. See *Ford v. Wainwright*, 752 F.2d 526, 528 (11th Cir. 1985). Because these decisions predate significant developments in Eighth and Fourteenth Amendment jurisprudence, their applicability in the context of this case is severely limited. First, *Solesbee* and *Caritativo* did not purport to consider whether the Constitution imposed any substantive prohibitions on the execution by States of mentally incompetent prisoners because the Eighth Amendment's prohibition against cruel and unusual punishment was not applicable to the State until 1962. See *Robinson v. California*, 370 U.S. 660 (1962). Second, although *Solesbee* and *Caritativo* did address the procedural issue of what process was due in these circumstances, the requirements of enhanced reliability and consistent, reasoned decisionmaking in capital sentencing imposed by this Court in *Furman* in 1972 and its progeny has rendered impermissible under the Eighth and Fourteenth Amendments many sentencing practices that were approved previously under the Due Process Clause. See *Lockett v. Ohio*, 438 U.S. at 599; *Gregg v. Georgia*, 428 U.S. at 195-96 n.47. Third, *Solesbee* and *Caritativo* were decided before this Court accorded state-created "objective expectation[s]" the procedural protections of the Due Process Clause. *Vitek v. Jones*, 445 U.S. 480, 489 (1980). See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (and cases cited therein).

⁸ In addition to the constitutional values underlying the right not to be executed while mentally incompetent, there are several bases, recognized historically at common law, for prohibiting the execution of mentally incompetent prisoners. See generally *Ford v. Wainwright*, 752 F.2d at 531 (Clark, dissenting).

tice Burger's observation in *Lockett v. Ohio* regarding capital sentencing is even more apt with respect to post-sentencing capital determinations: "The nonavailability of corrective or modifying mechanisms with respect to an *executed* capital sentence underscores the need for individualized consideration [and accurate factfinding] as a constitutional requirement [in these proceedings]." 438 U.S. at 605 (emphasis added).

Assuming the Court recognizes in this case a constitutional right not to be executed while incompetent, "the determination of [prisoners' competency to be executed] is critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.'" *Vitek v. Jones*, 445 U.S. 480, 491 (1980), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).⁹ This Court consistently has recognized that "the adequacy of statutory procedures for deprivation of a statutorily created [life, liberty or] property interest must be analyzed in [federal] constitutional terms.'" 445 U.S. at 490-91, n.6, quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part) (and cases cited therein). See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Balancing the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), as critical to the determination of what process is due, it is clear that federal due process demands as heightened

⁹ Even where the entitlement is based on a state-created right rather than a substantive federal constitutional right, the minimum due process requirements are "a matter of federal law [and] are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." 445 U.S. at 491. Nor does the fact that certain determinations are primarily medical or psychological in nature, and that States rely "on the opinion[s] of . . . designated physician[s] or psychologist[s] for determining whether the conditions warranting [deprivation of a protected interest] exist[,] . . . remove[] the prisoner's interest from due process protection[] or answer[] the question of what process is due under the Constitution." *Id.*

procedural protections in determining *present* eligibility for the death penalty as are required in the initial guilt and sentencing phases of capital proceedings.¹⁰

Those protections include the opportunity to review and challenge the accuracy of information upon which the sentencing authority relies in imposing capital punishment, *see Gardner v. Florida*, 430 U.S. 349 (1977); the assistance of a competent mental health professional, and appointment of such a professional for indigents, "in [the] evaluation, preparation, and presentation of" all issues relevant to the defense, *Ake v. Oklahoma*, 105 U.S. at 1097; and a written statement by the sentencing authority of the evidence relied on and the reasons for the imposition of capital punishment, to ensure adherence to proper substantive and procedural standards. *See Gregg v. Georgia*, 428 U.S. at 195. These measures, which seek to ensure consistency and reliability in the imposition of capital punishment, are "a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson v. North Carolina*, 428 U.S. at 304, including the actual execution of the death sentence. The absence of these safeguards in the State's determination of competency to be executed creates a constitutionally intolerable risk of erroneous deprivation of life.

¹⁰ The three factors identified by the Court as relevant to the determination of what process is due before an individual may be deprived by governmental action of a protected life, liberty or property interest are: 1) the private interest that will be affected by the governmental action; 2) the governmental interest that will be affected if the proposed safeguard is provided; and 3) "the probable value of the additional . . . procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake v. Oklahoma*, 105 S.Ct. at 1094. *See Mathews v. Eldridge*, 424 U.S. at 335.

A. Accurate And Reliable Factfinding On The Issue Of Mental Competency Requires An Adversary Hearing Where The Issue Of Competency Is Disputed.

The Due Process Clause requires that before individuals are finally deprived of a constitutionally protected interest, they must be provided "some form of hearing" in which to present their case and have its merits fairly judged. *Board of Regents v. Roth*, 408 U.S. at 570-71, n.8. The nature of the required hearing, however, "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Weighing, under *Mathews*, the private and governmental interests at stake in light of the probable contribution that adversary hearings will make to the consistency and reliability of competency determinations, the balance tips overwhelmingly in favor of providing condemned prisoners a meaningful opportunity to review and challenge the factual bases of the State's determinations regarding their mental status.

It cannot reasonably be disputed that "[t]he private interest in the accuracy of a . . . proceeding that places an individual's life . . . at risk is almost uniquely compelling." *Ake v. Oklahoma*, 105 S. Ct. at 1094. Although condemned prisoners may have forfeited some constitutional protections by virtue of having been duly convicted and sentenced to death, assuming the execution of incompetent prisoners is forbidden under federal or state law, such prisoners must be considered to possess a "residuum" of "life" interest so long as they are incompetent. Thus, condemned prisoners of questionable competency retain a powerful interest in the reasoned determination, based on reliable factfinding, of their competency to be executed.

Likewise, the State has a compelling interest in ensuring the accuracy and reliability of competency proceedings. Indeed, the State's interest in assuring that its "ultimate sanction" is not erroneously carried out is "profound." *Id.* at 1097. The State has additional in-

terests in the deterrent and retributive values of enforcing sanctions that have been lawfully imposed by its criminal process, unimpeded by delays and additional administrative or financial burdens. However, unlike a private adversary, the State must temper its interest in efficient enforcement of the death penalty with its larger interest in preserving the constitutional integrity of its criminal justice system. *Id.* at 1095.

The safeguard of an adversary hearing, in which prisoners are permitted to review and challenge evidence of their competency that is adduced by the State, enhances substantially the likelihood of accurate determinations of competency. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977). Although providing condemned prisoners with such an opportunity may cause delays in the administration of their ultimate punishment, those costs are clearly outweighed by the benefits of allowing the adversary process to sharpen and refine the evidentiary bases on which determinations are made to carry out "this most irrevocable of sanctions." *Gregg v. Georgia*, 428 U.S. at 182.

In *Gardner v. Florida*, the Court held that the Due Process Clause required an opportunity for adversarial debate on "confidential" presentence reports on which the State intended to rely in a capital sentencing proceeding. Regarding the State's interest in avoiding delay, the Court stated that delay could be avoided if the decisionmaker disregarded any material in the report which was contested by the defendant. If, however, the contested material was "of critical importance [and therefore would be used by the decisionmaker in sentencing the defendant], the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." *Id.* at 359-60.

Similarly, the Court cautioned that "consideration must be given to the quality, as well as the quantity, of the information on which the [decisionmaker] may rely" in imposing the death penalty. *Id.* at 359. Information

that has not been subjected to the "truth-seeking function" of the adversary process is inherently less reliable than information that has been so tested. This is particularly true with mental health assessments. As the Court has noted, mental health professionals "disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior symptoms. . . ." *Ake v. Oklahoma*, 105 S.Ct. at 1096. The same uncertainties in mental health assessments that the Court has noted in the contexts of civil commitment, the insanity defense and incompetence to stand trial¹¹ are equally applicable in the context of determinations of competency to be executed. Indeed, because questions of competency in this context arise only after the individual has already been determined to have been competent to stand trial, and not insane at the time of the offense, the symptoms of mental disorder at this stage can be particularly "elusive and often deceptive," and therefore difficult to assess. *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950). Thus, allowing condemned prisoners whose competency is questionable to call witnesses, cross-examine the State's mental health experts, and present arguments and mental health experts on their own behalf is especially necessary to reduce to a constitutionally tolerable level the risk of erroneous deprivation of life.

Even where the private interest at stake is less than life, the Court has rejected deprivation by the State of an individual's constitutionally-protected interest in the absence of an adversary hearing. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Court held that a prisoner's liberty interest was violated by his classification as mentally ill and involuntary transfer to a mental hospital for psychiatric treatment without adequate procedural protections. Although recognizing the State's "strong" interest

¹¹ See generally, *Addington v. Texas*, 441 U.S. 418, 429-30 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Greenwood v. United States*, 350 U.S. 366, 375-76 (1956); *Solesbee v. Balkcom*, 339 U.S. 9 (1950).

in segregating and treating mentally ill patients, the Court found the prisoner's state-created interest in not being "arbitrarily classified as mentally ill and subjected to unwanted treatment . . . powerful." *Id.* at 495. These and other considerations, including the substantial risk of error in making the required mental health assessments under the statute, led the Court to require adequate procedural safeguards in making these determinations.¹² Recognizing that the inquiry in *Vitek* was "essentially medical . . . 'turn[ing] on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists,'" the Court stated that "[t]he medical nature of the inquiry, however, [did] not justify dispensing with due process requirements." 445 U.S. at 495, quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979). Rather, "[i]t is precisely [because of] '[t]he subtleties and nuances of psychiatric diagnoses' that . . . adversary hearings [are required]." *Id.*, quoting 441 U.S. at 430 (emphasis added).

B. Accurate And Reliable Factfinding On The Issue Of Mental Competency Requires The Assistance Of Mental Health Professionals In The Evaluation And Preparation Of All Issues Relevant To Determining Condemned Prisoners' Competency.

A ruling that due process requires access to competent mental health professionals to examine and meaningfully assist prisoners during competency hearings is an appropriate accommodation of the competing interests of the State and condemned prisoners. This requirement necessarily includes the appointment of mental health professionals to assist indigent condemned prisoners of questionable competency. See *Ake v. Oklahoma*, 105 S.Ct.

¹² The procedural safeguards included, *inter alia*, a hearing at which: the State is required to disclose the evidence on which it intends to rely; prisoners are given an opportunity to be heard in person and to present contrary documentary evidence; and prisoners are provided an opportunity to present testimony by their own witnesses and to confront and cross-examine witnesses called by the State.

1087 (1985). Both the State and condemned prisoners have a very substantial interest in the fair and accurate adjudication of condemned prisoners' competency to be executed. The State has additional interests, however, in avoiding the financial and administrative burdens that providing condemned prisoners with the assistance of mental health professionals would impose on its criminal justice system. However, in light of the compelling interests of both the State and the individual in accurate dispositions, it is clear that those governmental interests are "not substantial." *Ake v. Oklahoma*, 105 S.Ct. at 1095.

Balancing these private and governmental interests in light of "the probable value of [the assistance of a mental health professional], and the risk of erroneous deprivation of the [prisoner's life] if [such a safeguard] is not provided," the weight favors providing the assistance of independent mental health professionals to prisoners of questionable competency. *Ake v. Oklahoma*, 105 S.Ct. at 1094. Providing such prisoners with independent mental health professionals who will conduct appropriate examinations, challenge the findings of State experts, and provide other relevant assistance will contribute to the adversarial debate and thereby enhance the decisionmaker's ability to make a reliable and informed determination.

In *Ake*, the Court, recognizing the "pivotal role" that mental health professionals have come to play in criminal proceedings, acknowledged that when "the defendant's mental condition [is] relevant to . . . the punishment he might suffer, the assistance of a [mental health professional] may well be crucial to the defendant's ability to marshal his defense." 105 S.Ct. at 1095. In such cases, because "the risk of inaccurate resolution of sanity issues [would be] extremely high" without such assistance, fair adjudication at the guilt and sentencing phases of capital cases requires, "at a minimum, [that the State] assure the defendant access to a competent [mental health professional] who will conduct an appropriate examina-

tion and assist in the evaluation, preparation, and presentation of the defense." *Id.* at 1097.

As in the guilt and sentencing phases of criminal proceedings, when a condemned prisoner's mental condition is relevant to the determination whether to proceed with a death sentence, the assistance of a mental health professional becomes critical to the fair and accurate determination of the prisoner's competency to be executed. A mental health professional retained or appointed to assist the prisoner will be able to examine the prisoner and conduct relevant tests over the period of time necessary to produce an accurate mental assessment, will provide the trusting relationship necessary to evoke the candid and spontaneous disclosures upon which accurate assessment depends, and will provide meaningful assistance to the prisoner and counsel in reviewing and responding to the reports of the State's mental examiners.¹³

The client-clinician relationship is particularly important in this context because the symptoms of psychological distress caused by the imminence of one's execution may not always manifest themselves in obviously aberrational behavior. In addition, because the psychological stress that accompanies living under a sentence of death can cause condemned prisoners to develop defensive mechanisms to cope with the stress, the mental health professional must be sensitive to the degrading nature of the forces—and their physical, psychological, and emotional impact—that uniquely press upon prisoners awaiting ex-

¹³ Although Petitioner was evaluated by two mental health professionals, the reports of those evaluations were neither submitted to the Governor, nor referred to in the state-appointed psychiatrists' reports to the Governor, for his consideration in determining Petitioner's competency to be executed. Moreover, the absence of an adversarial proceeding precluded any meaningful assistance to Petitioner by these professionals, *e.g.*, helping to prepare the cross-examination of the State psychiatrists, giving testimony on behalf of Petitioner.

ecution.¹⁴ To assess fully the effects that these defensive mechanisms have on a condemned prisoner's rational and factual understanding of his or her fate, *i.e.*, competency to be executed, the mental health professional must possess the time and the skill essential to developing a relationship with the prisoner that will provide the necessary access to the prisoner's psychological composition.

The provision of such assistance to prisoners of questionable competency will enhance significantly the likelihood of an accurate determination of the prisoner's competency to be executed: "By organizing [the prisoner's] mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the [decisionmaker], [mental health professionals] for each party enable the [decisionmaker] to make its most accurate determination of the truth of the issue before [it]." *Ake v. Oklahoma*, 105 S.Ct. at 1096.¹⁵

Thus, a proper balancing of interests, "where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, . . . requires access to a [mental] examination on relevant issues, to the testimony of the [mental health professional], and to assistance in preparation at the [post-sentencing competency evaluation] phase." *Id.* at 1097.

¹⁴ For example, a common reaction to the extreme anxiety and stark terror that many prisoners experience when confronted with the imminence of their death is the suppression of that reality by a variety of psychological defense mechanisms, including denial by delusion formation, denial by minimizing their predicament, projection, and obsessive preoccupation with religious, intellectual or philosophical matters. *See generally* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIAT. 393 (1962).

¹⁵ This is especially true given the frequency and breadth of disagreement that may obtain in mental evaluations of the same individual. *See* p. 12, *supra*.

C. Accurate And Reliable Factfinding On The Issue Of Mental Competency Requires Decisionmakers To Specify In Writing The Factors Relied Upon In Making Competency Determinations.

The requirement that decisionmakers in capital cases specify in writing the factors relied upon in reaching their decision to impose capital punishment has been recognized by the Court as necessary "to ensure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia*, 428 U.S. at 195.¹⁶ The requirement of written findings forces decisionmakers to focus more closely on the reasons underlying their decisions, and thereby enhances the likelihood of compliance with the required standards for imposing or proceeding with capital punishment.¹⁷ Written findings also provide an adequate basis for a collateral challenge to the constitutionality of competency proceedings, as well as for meaningful appellate review in those jurisdictions where such review is provided. In this way, the requirement of a written record satisfies the requirements of reasoned, consistent decisionmaking and enhanced reliability which have been articulated by this Court as the touchstones of constitutionally adequate decisionmaking in capital cases.

These protections are no less critical when the interests of condemned prisoners are balanced against those of the

¹⁶ Even in the noncapital context, the Court has recognized in certain circumstances that the proper balancing of individual interests and governmental interests demands a "written statement by the factfinder as to the evidence relied on and the reasons for [the deprivation of the individual's protected interests]." *Vitek v. Jones*, 445 U.S. at 495.

¹⁷ See also *Gardner v. Florida*, 430 U.S. at 361 ("[I]t is important that the record . . . disclose . . . the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*.") (footnote omitted).

State. Both the State and the questionably competent prisoners whose lives are at stake have a "compelling interest" in the accurate and reliable assessment of the prisoners' mental competency. *Ake v. Oklahoma*, 105 S.Ct. at 1095. The State's additional interests in financial and administrative economy are taxed only incrementally by requiring the decisionmaker to provide a written statement of the evidence relied on in determining the prisoner's competency. Indeed, the absence of such a statement, should the prisoner challenge the constitutionality of the State's determination in collateral or appellate proceedings, could require the State to bear the expense of an additional fact-finding hearing. Thus, on balance, due process requires that decisionmakers support their determinations that condemned prisoners of questionable competency are fully competent to be executed with written statements of their findings of fact.

II. THE PROCEDURES FOLLOWED BY THE STATE OF FLORIDA IN EVALUATING PETITIONER'S COMPETENCY TO BE EXECUTED FAILED TO PROVIDE AN ACCURATE AND RELIABLE DETERMINATION ON THE ISSUE.

Pursuant to *Fla. Stat.* § 922.07, "[w]hen the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." § 922.07(1). The Governor is required under the statute to instruct the examiners in writing "to determine whether [the condemned person] understands the nature and effect of the death penalty and why it is to be imposed upon him." *Id.* If, after receiving the reports from the commission, the Governor determines that the convicted person "has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant." § 922.07(2).

Following these procedures, on October 20, 1983, Petitioner's counsel advised the Governor that Petitioner's mental condition had deteriorated to the point where his sanity was questionable, and sought the appointment of a commission of psychiatrists.¹⁸ Three psychiatrists were appointed and, on December 19, 1983, as provided by statute, they examined Petitioner "with all three psychiatrists present at the same time [along with Petitioner's] [c]ounsel . . . and the state attorney . . ." § 922.07(1). The "examination" consisted of a one-half hour interview with Petitioner in the prison courtroom,¹⁹ conversations with the prison's medical and correctional staff, inspection of Petitioner's cell, and, in some cases, review of materials provided by Petitioner's counsel²⁰ which con-

¹⁸ Petitioner had been examined by a psychiatrist in July, 1981 in connection with unsuccessful clemency proceedings. Because of the deterioration of Petitioner's mental state, Petitioner's counsel arranged for Petitioner to continue seeing that psychiatrist on a therapeutic basis. Appendix to Petition for Certiorari (hereafter "*App.*") at 94a. In August, 1982, Petitioner discontinued therapy because he believed the psychiatrist was conspiring against him in concert with the Ku Klux Klan. *Id.* In January, 1983, because Petitioner wanted to dismiss his appeals and submit to execution, Petitioner's counsel sought evaluation of Petitioner's mental condition by a second psychiatrist in order to assess Petitioner's competency to make such a decision. *Id.* at 97a. Petitioner refused to see this psychiatrist—and anyone else, including family and counsel—until November, 1983. *Id.*

¹⁹ Also present during the interview were "one or two correctional officers" and two paralegals. Petition for Writ of Certiorari at 37.

²⁰ Although Petitioner's counsel provided these materials to the commission psychiatrists as background information prior to their interview, whether, and to what extent, these materials were actually reviewed by the psychiatrists is unclear. Two of the three commission members stated in their reports that they had reviewed the materials, but their reports did not even address, much less account for, the pervasive evidence in those materials of Petitioner's delusional processes. See *App.* 160a-166a. The third psychiatrist refused to accept the materials until *after* the interview, and *one* day before he submitted his report to the Governor. He made no reference in his report to having reviewed the materials. See *id.* at 160-62a.

tained portions of the trial transcript, copies of Petitioner's correspondence, reports of two earlier psychiatric exams, and Petitioner's medical history. Included in the reports of the two prior examiners, both of whom examined him over a significantly longer period than the commission psychiatrists and one of whom had been Petitioner's treating therapist, were the following observations: "[Petitioner's] mental disorder is severe enough to substantially affect [his] present ability to assist in the defense of his life[;]" "[Petitioner's] psychotic disorder [is] so severe that it suicidally compels him to embrace his own death[;]" and "[Petitioner] lacks the mental capacity to understand the reasons why [the death penalty] is being imposed on him." App. at 155a, 158a.²¹

²¹ See n.18, *supra*. The first psychiatrist, Petitioner's treating therapist, concluded, based on: 1) four in-person evaluations between July, 1981 and August, 1982; 2) taped conversations and letters between Petitioner and his family, friends and attorneys; 3) interviews with other individuals having had direct observations of Petitioner's behavior during that period; 4) psychological and psychiatric evaluations by the prison mental health staff; and 5) prison medical records, that Petitioner suffers from:

a severe, uncontrollable, mental disease which closely resembles "Paranoid Schizophrenia With Suicidal Potential". This major mental disorder is severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life.

It should be noted that Mr. Ford's ambivalence around whether to continue his legal fight is in and of itself an indication of a psychotic disorder so severe that it suicidally compels him to embrace his own death.

App. at 155a.

The second psychiatrist concluded after a three-hour interview that Petitioner suffers from "schizophrenia, undifferentiated type, acute and chronic," as a result of which,

while he does understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he com-

After their examination, notwithstanding the prior evaluations of Petitioner, all three psychiatrists reported to the Governor that although Petitioner suffered from a "severe adaptational disorder,"²² "psychosis with paranoia,"²³ or "serious emotional problems . . . [so] profound[] . . . it forces [one] to put a 'psychotic' label on [Petitioner],"²⁴ he "ha[d] enough cognitive functioning" to satisfy Florida's competency standard.²⁵ On April 30, 1984, without any further proceedings, the Governor signed Petitioner's death warrant.

Measured against the constitutionally-mandated standard in capital cases of enhanced reliability and consistent, reasoned determinations, the procedures by which Petitioner's competency was evaluated were grossly inadequate. First, although § 922.07(1) authorizes the appointment of counsel to "represent" condemned prisoners during competency evaluations, there is no provision in the statute for adversary participation by prisoners'

mitted and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the Governor and control him, President Reagan's interference in the execution process, etc.

App. at 158a (emphases added).

²² *App.* at 161a. The "disorder," however, "seem[ed] contrived and recently learned" and, therefore, not a "natural insanity." *Id.* at 162a. *But see* earlier report of non-commission psychiatrist:

[Petitioner] is suffering from schizophrenia, undifferentiated type, acute and chronic. The delusional material, the free-floating and disorganized ideational and verbal productivity, and his flatness of affect are the highlights of the signs leading to this diagnosis of psychosis. *The possibility that he could be lying or malingering is indeed remote in my professional opinion.*

Id. at 100a (emphasis added).

²³ *Id.* at 164a.

²⁴ *Id.* at 166a.

²⁵ *Id.* at 164a.

counsel or by independent mental health experts.²⁶ The absence of any adversarial debate on the issue of Petitioner's competency deprived the Governor of the opportunity to test the accuracy of the conclusions reached by the three state-appointed psychiatrists.

The opportunity to challenge the commission's findings was especially critical to a proper determination by the Governor of Petitioner's competency because, although all of the examiners agreed that Petitioner suffers from some form of serious mental disorder, they disagreed as to the severity of his mental disorder. Moreover, the commission's conclusions differed radically from the conclusions of two other psychiatrists who earlier had performed more extensive and comprehensive examinations of Petitioner, with no indication that these earlier conclusions had been considered by the three State psychiatrists or reconciled with the conclusions they reported to the Governor. Because Petitioner was not given an opportunity to respond to the findings of the commission examiners, the quality of those findings was untested by the "truth-seeking function" of the adversary process, and were inherently unreliable. See *Gardner v. Florida*, 430 U.S. at 359. This conclusion is especially warranted because the decisionmaker—the Governor—was a lay person who lacked the specialized knowledge and training necessary to evaluate the conflicting evidence, at least without the benefit of an adversarial hearing. In view of these procedural deficiencies, the risk of error to which the determination of Petitioner's competency was subjected is constitutionally intolerable.

Like the absence of a hearing, the failure to provide Petitioner with the meaningful assistance of a competent mental health professional during these proceedings pre-

²⁶ Indeed, in construing this statute, the Florida Supreme Court approved the Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode v. Wainwright*, 448 So.2d 999, 1001 (Fla. 1984).

cluded the Governor's individualized consideration of all relevant factors and substantially undermined the possibility of accurate factfinding. Although Petitioner's mental condition was evaluated by two psychiatrists prior to the § 922.07 proceeding, the failure to provide for meaningful participation in the proceedings by these professionals resulted in the exclusion of highly probative evidence on the issue of Petitioner's competency. Not only were the comprehensive reports of these professionals not considered by the Governor,²⁷ but he was not even made aware of the *existence* of these reports by the commission psychiatrists. Nor were the commission psychiatrists required to explain, deny, or otherwise account for the extensive documentation by these professionals of Petitioner's psychotic delusional processes, and their conclusions that Petitioner's severe psychosis "suicidally compels him to embrace his own death" and that he "lacks the mental capacity to understand the reasons why [the death penalty] is being imposed on him." *App.* at 155a, 158a. Thus, the Governor's decision was based upon partial and unchallenged information of highly questionable accuracy. This exclusion of highly relevant information is inconsistent with the constitutional requirement that the decisionmaker in capital proceedings "possess[] the fullest information possible concerning the defendant's life and characteristics," including any mitigating evidence. *Lockett v. Ohio*, 438 U.S. at 603, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

The failure to provide Petitioner with an adversary proceeding in which he could be assisted meaningfully by competent mental health professionals is especially egregious in view of the nature of the "examination" conducted by the state-appointed psychiatrists. As noted above, their "examination" consisted of a one-half hour interview with Petitioner in the prison courtroom, con-

²⁷ There is no provision in the statutory scheme of § 922.07 for submitting materials other than those prepared by the commission psychiatrists to the Governor.

versations with the prison staff, inspection of Petitioner's cell and cursory review, at best, of background materials containing Petitioner's medical history and reports of other psychiatric evaluations. These procedures fall significantly below the generally accepted standard of care necessary to produce reliable forensic mental health evaluations.²⁸

First, "[b]ecause psychological states are complex and fluctuate, a single and relatively brief examination is . . . inadequate." J. ZISKIN, 2 *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 13 (3d ed. 1981). See also Ziskin, *Giving Expert Testimony: Pitfalls and Hazards for the Psychologist in Court*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST* 101 (G. Cooke, ed. 1980) ("[A] single examination even of two to three hours duration, is insufficient [M]aterial elicited in a single session might be quite different a week later in the same individual [I]t is advisable to spread the examination over at least two and preferably three sessions."). Manifestations of schizophrenia "are present one day and not the next. They are revealed to one examiner and not to another A complete account of a patient's symptomatology, therefore, demands that he be observed over an extended period of time." L. BELLAK & L. LOEB, *THE SCHIZOPHRENIC SYNDROME*, 337-38 (1969), cited in *Hays v. Murphy*, 663 F.2d 1004, 1012 n.13 (10th Cir. 1981) (discussion of competency to bring habeas proceeding on one's own behalf). A one-half hour examination fails to provide a sufficient basis for an accurate and reliable professional opinion as to a condemned prisoner's competency to be executed.

Proper clinical evaluation also requires the establishment of a trusting relationship with the examiner, in a physical setting that is conducive to evoking the spontaneous and

²⁸ See also the critical reviews of these procedures by two nationally-known forensic psychiatrists. *App.* at 169a, 187a. See generally nn.30, 32, *infra*.

candid exchange with the subject that forms the principal basis for the evaluation. Standard 4.1 of the Standards for Providers of Psychological Services, requires psychologists to "promote the development in the service setting of a physical, organizational, and social environment that facilitates optimal human functioning."²⁹ See also APA, *Specialty Guidelines for the Delivery of Services by Clinical Psychologists* at Guideline 4, 36 AM. PSYCHOL. 640 (1981). The likelihood that, given Petitioner's paranoid condition, the courtroom was inherently "oppressive" to Petitioner and thereby increased the difficulty of establishing trust with his examiners, is substantial. See generally Wilson, *Prison As An Environment* in THE ROLE OF THE FORENSIC PSYCHOLOGIST, *supra* at 279. This impression might have been reinforced further by the presence of correctional officers, and numerous other "strange" individuals—including the three psychiatrists—all observing him during the same brief time period. Finally, the very short time period made it extremely unlikely that any of the commission psychiatrists would be able to establish sufficient rapport with Petitioner to evoke reliable data on which to base a valid assessment of his mental condition.³⁰

²⁹ The Interpretation of this Standard provides in pertinent part:

As providers of services, psychologists have the responsibility to be concerned with the environment of their service unit, especially as it affects the quality of service, but also as it impinges on human functioning Physical arrangements and organizational policies and procedures should be conducive to the human dignity, self-respect, and optimal functioning of users, and to the effective delivery of service.

APA, *Standards for Providers of Psychological Services*, 32 AM. PSYCHOL. 495 (1977).

³⁰ These criticisms were made also by the forensic psychiatrists who reviewed the commission psychiatrists' procedures:

The conditions under which the interview was conducted, including the amount of time spent interviewing [Petitioner], were unlikely to produce sufficient data for reliable forensic

In addition to the clinical interview, forensically-oriented mental health professionals generally require appropriate physical examinations and certain standard psychological test batteries before rendering an opinion on an individual's mental competency. *See generally* T. BLAU, *THE PSYCHOLOGIST AS EXPERT WITNESS* (1984); H. KAPLAN, A. FREEMAN & B. SADDOCK, *A COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/III* (3d ed. 1980). Further psychological assessment was especially important in this case because of the difficulties of establishing verbal communication with Petitioner.³¹ Had psychological tests been administered to Petitioner, the commission psychiatrists would not have had to rely "largely on inferential deduction from physical behavioral observation," *App.* at 160a, and other nonverbal indicia, which "greatly enhance the opportunity for error and misinterpretation

evaluation. The interview was conducted in a courtroom, and a "room full" of people, including one or more correctional officers, was present. The environment was thus not conducive to the informal, intimate setting which is generally necessary to establish sufficient rapport for a psychiatric interview. In the setting described it would have been extremely difficult for [Petitioner] to fully reveal his problems or the nature of his illness. The thirty minute effort to establish communication under the conditions already noted was also inadequate. On rare occasions some patients can be accurately diagnosed in such a brief period. [Petitioner]'s diagnosis, however, was not easily made due to the unusual nature of his behavior and his unusual method of communicating.

App. at 171a. *See also id.* at 192a.

³¹ One of the commission psychiatrists reported that "[t]he interview was conducted with great difficulty from a verbal point of view, since the inmate respond[ed] to questions in a stylized, manneristic doggerel. Thus, an answer to a question might be 'beckon one, come one, Alvin one, Q one, kind one.'" *App.* at 160a.

Another reported that "[Petitioner] did not initially respond but did so after his lawyers encouraged him. Most of his responses to the questions were bizarre. He continued to respond by jibberish talk such as 'break one', 'God one', 'heaven one.'" *Id.* at 163a.

on the part of the examining [clinician]," in assessing Petitioner's competency.³²

Psychological tests, which measure a variety of factors including intelligence, personality and psychopathology,³³

³² See Critique of Forensic Psychiatrist at App. 190a:

[One of the commission psychiatrists] indicated that by his ability to "read between the lines" of verbal responses which [Petitioner] did give that [the psychiatrist] was of the opinion that [Petitioner] knew exactly what was going on[,] but if one relies on the transcript of the interchange between the psychiatrist and [Petitioner] then there is great doubt, at least to this observer, that there was a rational interchange between [Petitioner] and the psychiatrist, because [Petitioner] gave irrelevant responses to questions put to him although the words he used had some association with the questions asked. [Petitioner]'s responses do not indicate he had a rational understanding of the process and in fact some of [Petitioner]'s responses were interpreted by [the psychiatrist] to mean [Petitioner] maintained the belief that he would be spared by the angel of death and this delusional belief is in keeping with other delusional beliefs that [Petitioner] manifested to others in his correspondence.

³³ See, e.g., the Wechsler Adult Intelligence Scale ("WAIS"), the Minnesota Multiphasic Personality Inventory ("MMPI"), the Rorschach Test and the Thematic Apperception Test ("TAT"). The WAIS is the most widely accepted intelligence test for adults. It is administered individually by the examiner, and consists of 11 sub-tests, six comprising the Verbal Scale and five comprising the Performance Scale. The Verbal Scale measures general information, memory, vocabulary, mathematical skills and practical judgment. The Performance Scale measures visual-motor skills as well as more verbally-oriented cognitive skills.

The MMPI is the most commonly used and accepted non-projective test of personality. It consists of 550 affirmative statements to which the testee responds "true", "false", or "cannot say". The MMPI items range widely in content and include such areas as health, psychosomatic symptoms, neurological disorders, and motor disturbances; sexual, religious, political, and social attitudes; educational, occupational, family, and marital questions; and many well-known neurotic or psychotic behavior manifestations, such as obsessive and compulsive states, delusions, hallucinations, ideas of reference, phobias, and sadistic and masochistic trends. The test

permit an accurate assessment of the examinee's functional abilities that are critical to a proper competency determination.³⁴ In addition, psychological testing may be helpful in demonstrating pathology that is not evident clinically. See Cooke, *The Role of the Psychologist in Criminal Court Proceedings*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST*, *supra* at 96.³⁵ Psychological tests may also be useful in assessing the issue of malingering, a concern stated by one of the commission psychiatrists.³⁶ See D. SHAPIRO, *PSYCHOLOGICAL EVALUATION AND EXPERT TESTIMONY* 188 (1984). The use of psychological tests of intelligence and cognitive capacity is particularly important in jurisdictions such as Florida where the test for mental capacity focuses exclusively on the individual's ability to understand the nature and effect of the death penalty and why it is to be imposed on him. In

yields a profile analysis based on the interrelationships of the scores on ten clinical scales.

The Rorschach Test and the TAT, which consist of unstructured tasks designed to encourage the free play of the examinee's fantasies, are among the most common projective tests. The test stimuli, Rorschach ink blots or ambiguous depictions in the TAT, are intentionally vague, requiring the examinee to produce responses that reveal psychological facts about himself or herself that otherwise may be hidden, *e.g.*, needs, anxieties, fears, personality structure. These tests are also helpful in assessing the intellectual skills and judgment of the examinee. See generally L. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* (4th ed. 1984); A. ANASTASI, *PSYCHOLOGICAL TESTING* (5th ed. 1982).

³⁴ Most psychological tests are designed to be essentially objective and standardized measures of samples of behavior. A. ANASTASI, *PSYCHOLOGICAL TESTING* (5th ed. 1982). One influential forensic psychiatrist has commented that psychological tests may be a "more objective method" of evaluation than the clinical interview. Sadoff, *Working with the Forensic Psychologist*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST* 106, 109 (G. Cooke, ed. 1980).

³⁵ See also Cooke, *An Introduction to Basic Issues and Concepts in Forensic Psychology*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST*, *supra* at 7 ("The use of tests provides the psychologist with a tool that may give him data not available to the psychiatrist . . .").

³⁶ See *App.* at 162a. See also n.22.

such jurisdictions, requiring assessment by psychologists, who are specially trained to assess intellectual ability and cognitive capacity, is critical to a reliable and accurate determination of mental competency. Notwithstanding the standard use of these procedures in clinical evaluations, and their particular appropriateness to the evaluation of Petitioner, the state-appointed psychiatrists failed to refer Petitioner to a competent psychologist for a comprehensive psychological assessment.

The final major respect in which the commission's reports fell below professionally acceptable standards for reliable forensic evaluations is their failure to account for the substantial data, including the opinions of two other psychiatrists who had performed more extensive and comprehensive examinations of Petitioner, that were contrary to the commission's findings. In their reports to the Governor, the commission psychiatrists made no reference at all to the grandiose delusions from which Petitioner suffers, which bear directly on his ability to understand why he is to be executed—the delusions that he has the power to free his family and others held hostage in the State Prison by the Ku Klux Klan, to fire and prosecute the officers responsible for the crisis, to replace the Justices of the Florida Supreme Court, and to stop his own execution. Nor did they account for the professional assessments of the prior examiners. This deliberate ignoring of the conclusions of other practitioners without further explanation severely undermines the credibility of the commission's reports. See generally Ziskin, *Giving Expert Testimony: Pitfalls and Hazards for the Psychologist in Court*, in *THE ROLE OF THE FORENSIC PSYCHOLOGIST*, *supra* at 101.

These professional shortcomings of the state-appointed psychiatrists' evaluations of Petitioner's mental condition, together with the absence of adversarial debate on their findings, the failure to permit Petitioner to submit expert evaluations by his own witnesses, and the failure to require the Governor to make a written record of the

evidence that he relied on in determining that Petitioner is competent to be executed, created a constitutionally intolerable risk that Petitioner will be deprived erroneously of his constitutional right not to be executed while insane. As a result, the procedures followed by the State of Florida in determining Petitioner's competency to be executed failed to meet the heightened standards of procedural fairness required in capital cases by the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALVIN BERNARD FORD, OR CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF
AND
BRIEF OF THE OFFICE OF
THE CAPITAL COLLATERAL
REPRESENTATIVE ET AL.

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MOTION OF THE OFFICE OF
THE CAPITAL COLLATERAL
REPRESENTATIVE ET AL. FOR
LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 36.3 of the
Rules of this Court, the Office of the

Capital Collateral Representative for the State of Florida (hereafter "CCR"), the Mental Health Association of Florida (hereafter "MHFA"), the National Mental Health Association, SHARE of Daytona Beach, Florida, the Montana Mental Health Consumers Advocacy Project, On Our Own, Inc., the Mental Patients' Association of New Jersey, and the Mental Patients' Association of Philadelphia move for leave to file the attached brief as amici curiae.

The reasons supporting the granting of this motion and the issues which amici are uniquely qualified to address are set forth in the statement of interest of amici in the attached brief.

Petitioner has consented to the filing of this brief, and his letter

is being filed with the Clerk of this Court. Consent was requested of respondent, but was denied. Amici respectfully submit that they have important, relevant, and expert information to contribute to the Court that will be useful in deciding this case, and that will not be provided by the parties.

Respectfully submitted,

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THE INTERESTS OF THE OFFICE OF
THE CAPITAL COLLATERAL REPRESENTATIVE
FOR THE STATE OF FLORIDA ET AL.

The Office of the Capital Collateral Representative for the State of Florida (CCR) was created by the Florida Legislature, effective July 1, 1985, in response to the compelling need for representation in post-conviction proceeding for indigent prisoners sentenced to death.

This new State agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in State or Federal courts after direct appellate proceedings are concluded and the conviction and sentence have been affirmed.

As the State agency expressly responsible -- under a limited budget -- for representing all indigent Florida

prisoners under sentence of death, CCR has a critical interest in the establishment of appropriate guidelines for procedural due process protections for its clients who may have become insane while facing execution.

The Mental Health Association of Florida, a non-profit corporation, works for improved research, prevention, detection, and treatment of mental illness. Its members include clients of mental health services, their families, and other interested citizens.

MHAF has a clear interest in this case for two reasons. First, some of its members receive mental health treatment and are potentially vulnerable to conviction, sentence, and execution even while being treated. Second, MHAF adopted a policy statement in 1984 on the mental capacity to be executed,

opposing the execution of anyone lacking it, opposing the appointment of government psychiatrists to determine it, and endorsing judicial determination of it. MHAF, having lent its expertise to bring this issue to the public's attention, is eager that it be resolved favorably in this Court.

The National Mental Health Association (NMHA) is the nation's largest and oldest mental health organization, having been founded in 1909. Its membership and goals, and its interests and expertise for the purposes of this brief, are similar to those of the MHAF, which is a division of the NMHA.

The NMHA is particularly concerned that one of its goals, that of ensuring that everyone who needs psychiatric care receives it, is blocked by the inadequate procedures of various

states ostensibly adhering to the common-law right of the insane not to be executed.

SHARE of Daytona Beach, Florida, Inc., formed in 1980 and incorporated in 1985, is a public advocacy group for mental patients and former mental patients. SHARE (which stands for Self Help Association Regarding Emotions) also conducts peer counseling for indigent people with mental problems. It is concerned that Florida death-row inmates who become insane, particularly indigent ones such as Petitioner, do not receive adequate treatment. SHARE joins this brief to demonstrate how this problem arises under the vagaries of Florida law and practice.

The Montana Mental Health Consumers Advocacy Project, formed in 1983 and based in Billings, Montana, is a political action organization for and

of former mental patients. An unincorporated association, the Advocacy Project works to end discrimination against and stigmatizing of mental patients and former mental patients. It also lobbies legislatively for the rights of mental patients. Through its legislative work, the Advocacy Project is familiar with the Montana statutes meticulously ensuring that condemned prisoners who become insane are not executed and are treated. The Group brings these statutes to the Court's attention and requests that condemned prisoners in all states be accorded at least as much due process protection.

On Our Own, Inc. is a Baltimore, Maryland organization of people who have spent time in psychiatric facilities. Its members engage in peer support, and public advocacy for former and current

mental patients. Its goals include ensuring both proper treatment for psychiatric disturbances and proper diagnosis as well. On Our Own believes that the procedures of Maryland and other states to protect insane prisoners from being executed cannot be effective when they do not even require psychiatric examinations before sanity is determined. On Our Own suggests to the Court that Maryland's procedure is the least adequate among the states with applicable statutes and demonstrates the need to articulate minimum due process requirements in this area.

The Mental Patients' Association of New Jersey is an unincorporated statewide network of former and current mental patients and their self-help organizations. The Association is aware that statute and case law in New Jersey

is silent on the procedure to transfer insane inmates from death row to mental health facilities. In the face of such silence, the Association wishes to convey to this Court the federal due process minimums it perceives are necessary in New Jersey to protect the right not to be executed while insane.

The Mental Patients' Association of Philadelphia was formed to prevent erosion of the rights and freedoms of those who are, have been, and may need to be hospitalized for psychiatric illness. The Association is particularly concerned that the common-law prohibition on executing a person the State knows is insane is evaded when the State chooses to ignore insanity or refuses to institute proceedings to determine it. The Association lends to this brief pro-

cedural proposals to stem the erosion of the right not to be executed while insane.

FACTS

Amici adopt the Statement of the Case submitted by Petitioner Alvin Ford in his Brief.

SUMMARY OF ARGUMENT

The judgment of the Eleventh Circuit should be reversed and remanded for three reasons:

First, the Eleventh Circuit relied on Solesbee v. Balkcom, 339 U.S. 9 (1950), to uphold Section 922.07 of the Florida Statutes, but Solesbee is no longer good law, or is at best inapplicable

Solesbee is inapplicable because:

*It assumed that governors would welcome information on the sanity vel non of condemned prisoners; Florida's governor, in accordance with his policy in such cases, apparently refused to review such information about Petitioner.

*It analogized stay of execution for insanity with executive clemency, an inaccurate analogy in Florida, where the former is mandatory and the latter discretionary, and an accurate analogy in only two States, if any.

Solesbee is no longer good law because:

*It was decided before the distinction between rights and privileges had been discarded.

*It relied on the then recent case of Williams v. New York, 337 U.S. 241 (1949), the relevant portion of

which was overruled in Gardner v. Florida, 430 U.S. 349 (1977).

Second, were this Court to overrule Sollesbee and hold allegedly insane inmates in all states are entitled to federal procedural due process in the determination of their sanity, without also articulating federal due process minimums for condemned prisoners, insane death-row inmates will continue to receive widely disparate procedural protections from the different states. For example, the same death-row inmate, sentenced for the same crime, could receive different protections if he were transferred between states, in light of this Court's recent decision of Heath v. Alabama, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985).

Third, while federal procedural due process is a flexible concept, it

requires certain minimums that were not met in this case, under Florida law and practice, and that are not met under the laws of most other states. The minimums for prisoners who may become insane while awaiting capital punishment are:

- *Effective assistance of counsel at all stages of the process to determine sanity.

- *The right to initiate the determination of sanity.

- *The right to be examined by qualified and impartial mental examiners once insanity is alleged.

- *The right to retain an examiner.

- *Access to the written reports of any examiner submitted to the governor or the person determining sanity.

- *An evidentiary hearing to determine sanity.

*Adequate notice before the hearing.

*The right to be present at the hearing.

*The right to introduce evidence

*The right to compel attendance of witnesses.

*The right to cross-examine adverse witnesses.

*The right to obtain a decision with findings of fact on which meaningful judicial review can be based.

*Judicial determination of sanity.

*The right to appeal a determination of sanity.

*The same procedural protections to determine recovery of sanity as to determine insanity initially.

ARGUMENT

- I. The decision in Solesbee must be overruled formally or at least be recognized as inapplicable.

The courts below held Petitioner was not denied procedural due process during the governor's determination of his sanity. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984); Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985), reh'g en banc denied, 765 F.2d 154 (11th Cir. 1985), cert. granted, 106 S.Ct. 566, 88 L.Ed.2d 552 (1985). The courts so held despite their recognition that under Florida law "an insane person cannot be executed," Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984) (quoting Goode v. Wainwright, 448 So.2d 999, 1001 [Fla. 1984]); their acknowledgement that Petitioner was denied an adversarial hearing pursuant to "the governor's

publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane," Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984); and their knowledge that the governor, pursuant to that same policy, apparently did not consider the report of Dr. Harold Kaufman, who found Petitioner insane.

The sole authority for those decisions was this Court's decision in Solesbee v. Balkcom. Solesbee, however, is inapposite for four reasons.

First, the facts here were not present in Solesbee: a per se rule by Florida against advocacy on behalf of a condemned prisoner during the determination of his sanity in the face of direct evidence of his insanity. "Whether this

Governor declined to hear any statements on petitioner's behalf, this record does not show." Solesbee, 339 U.S. at 13.

This Court in Solesbee, with no record of any exclusion of evidence on behalf of Solesbee, assumed that the governor would accept and consider all direct evidence proffered on behalf of the condemned: "We would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases when human lives depend upon their decision." 339 U.S. at 13. Dr. Kaufman's report was not welcomed in this case; there is no evidence that it was even considered.

Second, this Court in Solesbee relied heavily on a mistaken belief in the similarity between executive clemency or pardon and stay of execution by reason of insanity. 339 U.S. at 11-12.

There is no such similarity under the law of Florida and most other states. Florida places pardons and similar acts of clemency in "the sole, unrestricted, unlimited discretion" of the governor, Sullivan v. Askew, 348 So.2d 312, 315 (Fla., 1977), cert. denied, 434 U.S. 878 (1977); see also, Chapter 940 of the Florida Statutes, but flatly prohibits the governor from executing an insane person.^{1/} There is no discretion. Once insanity is determined, execution must be stayed.

The relevant statute, Section 922.07(3) of the Florida Statutes, uses mandatory language: a condemned prisoner lacking capacity "shall" be committed to

^{1/} Ironically, the governor as a matter of practice always holds hearings on requests for clemency, despite their discretionary nature, and never holds hearings to determine sanity.

a mental institution until his sanity is restored. Similarly, under the common law of Florida, "one [could not] be . . . executed while insane." Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957). See also Ex parte Chesser, 93 Fla. 291, 111 So. 720, 721 (Fla. 1927); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939).

The analogy between executive clemency and a governor's suspension of execution by reason of insanity is accurate, if at all, in only two states. The governors of Massachusetts and New York, alone among state executives, have discretion both to grant executive clemency and to suspend execution for reason of insanity. (In Massachusetts, the two functions are subject to the advice and consent of the executive council.) Mass. Ann. Laws. ch. 279,

§ 62 (Michie/Law Coop. 1984 Supp.); id. at ch. 127, § 152; N.Y. Correct. Law 655 (McKinney 1984 Supp.); N.Y. Const. art. IV, § 4.

Not even in Georgia, where Solesbee arose, does the analogy still hold. The governor retains discretion to suspend the execution of insane prisoners, Ga. Code Ann. § 27-2602 (1983), but has lost the power of executive clemency to the State Board of Pardons and Paroles. Ga. Const. art. IV, § 2.

The four other states where governors play a role in suspending execution of insane prisoners require, rather than permit their governors to suspend such executions. See Ark. Stat. Ann. § 43-2622 (1977); Fla. Stat. Ann., supra; Md. Ann. Code Art. 27 § 75(c)

(1985 Supp.); S.D. Codified Laws Ann.
§ 23A-27A-24 (1979).

Courts, not governors, suspend execution for reason of insanity in 29^{2/} of the 37 states with applicable statutes or case law. The Solesbee Court's analogy is therefore invalid and its contention that "[s]eldom, if ever, has this power of executive clemency been subjected to review by the courts," 339 U.S. at 12, is irrelevant.

The third reason why Solesbee does not apply is that the radical changes in the law of procedural due process since this Court decided Solesbee

^{2/} Courts are responsible for suspending execution in the 24 states where courts or juries determine sanity. See Appendix I, category 8. Suspension is a judicial function in five of the states that defer to mental examiners to determine sanity: Connecticut, Delaware, Kansas, Nebraska, and Virginia. In Indiana, corrections officials in effect suspend execution. Ind. Code Ann. § 11-10-4-4 (Burns 1981).

have completely eroded the principal legal foundation on which it rested. Solesbee was decided when the procedural protections of the Due Process Clause were applicable to "rights," but not "privileges," including the "privilege" not to be executed while insane. See, e.g., Ughbanks v. Armstrong, 208 U.S. 481 (1908); Escoe v. Zerbst, 295 U.S. 490 (1935).

This Court has since rejected conditioning the availability of federal procedural due process on the distinction whether a "right" or "privilege" exists under state law. See Shapiro v. Thompson, 394 U.S. 618 (1969). Due process considerations no longer depend upon whether a State grants a "right" or a "privilege," Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Shapiro v. Thompson, 394 U.S. at 627 n.6 (1969);

see Wolff v. McDonnell, 418 U.S. 539, 557 (1974), Goss v. Lopez, 419 U.S. 565, 573 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971), but rather "the extent to which an individual will be "'condemned to suffer grievous loss.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 [1951] [Frankfurter, J., concurring]). Persons with "legitimate claims of entitlement" to benefits conferred under state law have been accorded procedural due process protections since Board of Regents v. Roth, 408 U.S. 564 (1972).

By virtue of the state-created right not to be executed while insane, see Perkins v. Mayo, and Hysler v. State, Florida has thus created an interest that warrants protection under the due process clause of the Fourteenth

Amendment. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Board of Regents v. Roth.

Fourth and finally, subsequent decisions of this Court have undercut another major legal premise of Solesbee. Solesbee's refusal to extend due process protection to a post-conviction sanity determination was in part based on the then recent decision in Williams v. New York, 337 U.S. 241 (1949), which held that a sentencing judge could rely upon confidential information without violating procedural due process. The Court in Gardner v. Florida, 430 U.S. 349 (1977), overruled that portion of Williams and held Gardner was denied due process when his death sentence was based on

information he had no opportunity to refute or explain. 430 U.S. at 363.^{3/}

In one of the two remaining cases that this Court relied on in Solesbee, Phyle v. Duffy, 334 U.S. 431 (1948), the due process issues were not decided, and on remand, Phyle received a hearing. In the other, Nobles v. Georgia, 168 U.S. 398 (1897), the "only question" was whether due process required a jury trial in a judicial proceeding. 168 U.S. at 405.

^{3/} The Court in Gardner observed that the Williams opinion itself had "recognized that the passage of time justifies a re-examination of capital sentencing procedures." 430 U.S. at 356. "In 1949, when the Williams case was decided, no significant constitutional differences between the death penalty and lesser punishments for crime had been expressly recognized by this Court." Id. at 357. But after Williams, the Court "expressly recognized that death is a different kind of punishment from any other which maybe imposed in this country." Id. Gardner thus substantially undercut the reasoning of both Williams and Solesbee by noting that constitutional developments in the law of capital punishment and due process require greater procedural protections for those convicted of capital crimes.

- II. Condemned prisoners who may be insane face increasingly disparate legal treatment from the States if Solesbee is overruled but federal due process minimums are not articulated.

The various states accord a wide spectrum of procedural protections to condemned prisoners who may be insane. Protections range from almost nonexistent to comprehensive.

Maryland, for example, requires suspension of execution if after a medical, but not a psychiatric examination, "it shall appear to the satisfaction of the Governor" that the prisoner is insane. Md. Ann. Code. Art. 27 § 75(c) (1985).

By contrast, a condemned prisoner in Montana may initiate the process by alleging insanity. Mont. Code Ann. § 46-14-202 (1983). The trial

court shall appoint at least one psychiatrist to examine the prisoner, may commit the prisoner to a suitable facility for examination, and may direct a psychiatrist retained by the prisoner to participate in the report. Id.

The examination report shall be filed with the court, county attorney, and defense counsel. It shall include a description of the examination, a diagnosis of the prisoner's mental condition, and an opinion as to his capacity to understand the proceedings and assist in his defense. § 46-14-203.

If the report is contested by either the county attorney or defense counsel, the court shall hold a hearing. The parties may summon and cross-examine the psychiatrists, and offer evidence. § 46-14-221(1).

If the court determines the prisoner is unfit for execution, it shall commit him to an appropriate institution. § 46-14-221(2). A hearing is also used to determine if and when the prisoner regains fitness. § 46-14-222.

The wide disparity of procedural protections for condemned prisoners who may be insane has greater potential for anomalous results after this Court's recent decision of Heath v. Alabama, 106 S.Ct. 433, 88 L.Ed.2d 387.(1985).

In Heath, this Court held that two states may prosecute a defendant for the same crime under the dual sovereignty doctrine, without violating the double jeopardy clause of the Fifth Amendment. The case arose when Larry Gene Heath hired two men to kill his wife. She was kidnapped in Alabama and murdered in

Georgia. Georgia indicted Heath for murder; Alabama indicted him for murder during a kidnapping.^{4/}

Heath "pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment, which he understood could involve his serving as few as seven years in prison." 106

S.Ct. at 435. (citation omitted).

Three months later, Alabama, dissatisfied with the punishment Heath faced in Georgia, indicted Heath for murder. See 106 S.Ct. at 442 (Marshall, J., dis-

^{4/} Dual prosecutions may result, not only when elements of an offense occur in different states, but also when two adjoining states share jurisdiction over a river between them that becomes the locus criminis. See State v. Cunningham, 102 Miss. 237, 59 So. 76, 80 (Miss. 1912). Under Heath, both states may prosecute offenses committed in the river's water or on a boat on the river, Welsh v. State, 126 Ind. 71, 25 N.E. 883 (Ind. 1890), a bridge over it, State v. Holden, 46 N.J. 361, 217 A.2d 132 (N.J. 1966), or a pier extending into it, State v. Federanko, 26 N.J. 119, 139 A.2d 30 (N.J. 1958).

sentencing). Alabama convicted Heath and sentenced him to death.

If Heath becomes arguably insane while awaiting judgment in Alabama he could receive a jury trial to determine his sanity. Ala. Code § 15-16-23 (1982). Had he been sentenced to death in Georgia, however, he would be denied such a trial. Ga. Code Ann. § 27-2601 (1982). He would be at the mercy of the governor, who has discretion whether to appoint a mental examiner, to determine sanity, and to order commitment to the Department of Human Resources. Id. at § 27-2602. It was this procedure, leaving so much to the discretion of the governor, that was upheld in Solesbee.

Heath did not address an important and relevant issue here: Which state executes judgment when sentences are mutually exclusive, as in the case of two death sentences?

Heath's sentence of life imprisonment from Georgia and death sentence from Alabama will be mutually exclusive if he serves his Georgia sentence first and is never paroled or otherwise released; i.e., if Heath is imprisoned in Georgia until he dies, Alabama will never have the opportunity to execute him. Heath's sentences will also be mutually exclusive if Alabama executes judgment first; i.e., once Alabama imposes the death sentence, Heath cannot serve his life term in Georgia.^{5/}

If Alabama may base its decision to prosecute Heath on its dissatisfaction with Georgia's sentence, see Heath, 106

^{5/} In fact, Heath is imprisoned in Alabama, which will probably try to impose capital punishment. Telephone interview with Ronald J. Allen, Heath's counsel before this Court (Jan. 16, 1986).

S.Ct. at 442 (Marshall, J., dissenting), Georgia could attempt to execute a prisoner, whom both states have convicted of capital crimes, based on its disapproval of Alabama's suspending execution due to insanity.

Georgia's weaker procedural guarantees would make a prisoner's execution easier. Executive officials in Alabama, to evade the trial judge's suspension of execution in that state, could cooperate in an inmate's transfer to Georgia. Cf. Heath, 106 S.Ct. at 444-45 (Marshall, J., dissenting) (Georgia and Alabama combined forces to secure Heath's death).

Were this Court to overrule Solesbee without articulating federal due process minimums for condemned prisoners, not only would different insane death-row inmates continue to

receive different procedural protections in different states, the same death-row inmate, in light of Heath, could receive vastly different protections as he was transferred between states.

The Fourteenth Amendment prohibits the States from depriving any person of life without due process of law. It is a federal constitutional right that does not vary with the state in which it is enforced. Although the States must respect and protect this right, it is not a state right whose minimums their legislatures may define.

The federal constitutional right of the insane not to be executed is an inappropriate subject of federalism and laboratory experimentation among the States. Cf. Chandler v. Florida, 449 U.S. 560 (1981) (absent a showing of prejudice of constitutional dimensions to defendants, states may experiment with radio,

television, and still photographic coverage of criminal trials). See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states may serve as laboratories for "novel social and economic experiments"). Cf. Garcia v. San Antonio Metro Transit Authority, 470 U.S. _____, 105 S. Ct. 1005, 1017, 83 L.Ed.2d 1016 (1985) (commerce clause case) (federal supervision of state judicial action is permissible only in constitutional matters) (citing Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 [1938])).

Amici are not requesting this Court to impose a "code of procedure; that is the responsibility of each State." Morrissey, 408 U.S. at 488. Amici do request, however, that this Court articulate "the minimum requirements of due process," id. at 489, for prisoners who become insane while awaiting capital punishment.

- III. Procedural due process requires certain minimal protections that were not provided here by the State of Florida and are not provided by most of the remaining states with capital punishment.

The divergent state practices supply a pool of workable procedural protections from which due process minimums can be drawn.

Recognizing that "due process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, 408 U.S. at 481; see Bell v. Burson, 402 U.S. at 540, amici submit that the method in Florida and other states to determine the fitness for execution of a condemned prisoner who may be insane must comprise certain due process minimums:

1. Effective assistance of counsel at all stages of the process to determine sanity;

2. Rights to initiate the determination of sanity; to be examined by qualified and impartial mental examiners once insanity is alleged; to retain an examiner; and to have access to the written reports of any examiner submitted to the governor or the person determining sanity.

3. An evidentiary hearing to determine sanity, after adequate notice to the condemned prisoner, at which the prisoner may be present, introduce evidence, cross-examine adverse witnesses, and obtain a decision with findings of fact on which meaningful judicial review can be based.

4. Judicial determination of sanity and review.

1. Condemned prisoners must be provided effective assistance of counsel at all stages of the determination process.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" Goldberg, 397 U.S. at 267 (quoting Grannis v. Ordean, 234 U.S. 385, 394 [1914]). But the right "'would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" Goldberg, 397 U.S. at 270 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 [1932]).

That is especially true for insane prisoners, who being too unfit to

assist their attorneys^{6/}, cannot be expected to proceed without them. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg, 397 U.S. at 268-69 (footnote omitted).

Nineteen states recognize the right of condemned prisoners to be represented by counsel during determinations of sanity. See Appendix I, category 7. Of these 19 states, Florida, Louisiana, South Carolina, and Virginia, appoint counsel for indigent prisoners. Fla. Stat. Ann. § 922.07(1) (West 1983); La. Code Crim. Proc. Ann. art. 643 (West

6/ Seven states (Idaho, Louisiana, Mississippi, Missouri, Montana, North Carolina, and Utah) include in their statutory definition of unfitness for execution the prisoner's inability to assist counsel in his own defense. Oklahoma has done so by case law. Bingham v. State, 82 Okla. Crim. 305, 169 P.2d 311 (Okla. Crim. App. 1946). Illinois statute requires mental examiners to report on the prisoner's ability to assist counsel.

1981); S.C. Code Ann. § 44-17-530 (Law Co-op. 1985); Va. Code § 19.2-182 (1983). Although defense counsel was appointed for at least one condemned prisoner in California, the state supreme court ruled that due process did not require it. People v. Riley, 37 Cal.2d 510, 235 P.2d 381 (Cal. 1951).

2. Condemned prisoners must have rights to initiate sanity proceedings; to be examined by qualified and impartial mental examiners once insanity is alleged; to retain their own examiners; and to have access to the written reports of any examiner submitted to the governor or the person determining sanity.

The right not to be executed while insane, which no state has repudiated, has no remedy if condemned prisoners are powerless to initiate proceed-

ings to determine their sanity. Twenty-two states grant state officials, such as judges, governors, wardens, and sheriffs, discretion to initiate suspensions of execution for reasons of insanity.^{7/} Arkansas, for example, provides that when the state penitentiary superintendent "is satisfied that there are reasonable grounds for believing that a condemned prisoner is insane," the superintendent may transfer him to a state hospital. Ark. Stat. Ann. § 43-2622 (1977) (emphasis added).

"There can hardly be a comparable situation under our constitutional scheme of things in which an interest so great, that an insane man not be executed,

^{7/} Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, and Wyoming.

is given such flimsy procedural protection, and where one asserting a claim is denied the rudimentary right of having his side submitted to the one who sits in judgment." Caritativo v. California, 357 U.S. 549, 552-53 (1958) (Frankfurter, J., dissenting).

The Court of Appeals of Kentucky, now known as the Supreme Court of Kentucky, noted, "[T]he commonwealth or county attorney is expected to, and usually does, act upon an affidavit or information as to the necessity of the inquest, furnished by some relative, friend, or acquaintance of the lunatic, having knowledge of his condition. . . ."

Davidson v. Commonwealth, 174 Ky. 789, 192 S.W. 846, 847 (Ky. 1917) (emphasis added). The court, interpreting statutes including one similar to the current

Kentucky Revised Statute § 431.240(2), found no "provision that authorizes or allows the inquest upon the initiative of the supposed lunatic or any one for him. . . ." 192 S.W. at 847.

Perhaps it was the court's recognition of the danger that the commonwealth and county attorneys might not act as expected that led it to suggest that a condemned prisoner may invoke habeas corpus to initiate a determination of his sanity. 192 S.W. at 849 (dictum).

Similarly, the Tenth Circuit ordered a district court in Oklahoma to begin mental examinations and hold sanity hearings in response to a writ of habeas corpus by a petitioner acting as the condemned prisoner's mother and next friend. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981). Oklahoma statute does

not allow condemned prisoners to initiate investigations into their own sanity. Okla. Stat. tit. 22 § 1004 et seq. (West 1985).

Seven states statutorily grant the prisoner, his counsel, or next friend the right to initiate proceedings to determine sanity. See Appendix I, category 1. A eighth state, California, denies the right, Caritativo, but begins a sanity investigation automatically upon the scheduling of an execution. Cal. Penal Code § 3700.5 (West 1986) (added by 1961 Cal. Stat., c. 1739, after Caritativo).

The rest of the states are unclear about who may initiate proceedings.

Once the question of insanity has been raised by the prisoner or another person empowered to do so, qualified mental examiners should diagnose

the prisoner's condition. "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive symptoms of insanity'. . . . Ake v. Oklahoma, 470 U.S. _____, 105 S. Ct. 1087, 1095 (1985) (quoting Solesbee, 339 U.S. at 12).

Fourteen states, see Appendix I, category 2, including Florida, require the appointment of mental examiners or the prisoner's commitment to a mental health facility when a condemned prisoner's sanity is suspect; 11 states permit it.^{8/}

^{8/} Arkansas, Colorado, Connecticut, Delaware, Georgia, Louisiana, Missouri, New York, North Carolina, Rhode Island, and Utah.

Some states, however, use "lay witnesses," Ake, 105 S.Ct. at 1095, as mental examiners: Kansas and Nebraska, for example, appoint state hospital officials. Kan. Stat. Ann. § 22-4006 (1981 Supp.); Neb. Rev. Stat. § 29-2537 (1979).

In Kansas, the superintendents of four state hospitals or their assistants determine a prisoner's sanity without benefit of an adversarial hearing or input from an examiner appointed by the prisoner. Kan. Stat. Ann. § 22-4006 (1981 Supp.).

However, since "an impartial decision maker is essential," Goldberg, 397 U.S. at 271, state employees of the executive branch, which is ultimately responsible for carrying out death sentences, generally should not serve as mental examiners.

In New York, mental examiners appointed by the governor must be "disinterested," N.Y. Correct. Law § 655 (McKinney 1984); in North Carolina, judicially-appointed examiners must be "impartial." N.C. Gen. Stat. § 15A-1002(b)(1) (1983).

Impartial mental examiners are especially important when they do more than report their opinion of the prisoner's insanity to the governor or court, but make the final determination of sanity itself, as they do in nine states. See Appendix I, Category 8.

Six states recognize the importance of mental examiners appointed for or retained by condemned prisoners. Cf. Ake (when sanity at the time of the offense will be a significant trial issue, the Constitution requires states to assure defendants access to psychia-

trists). "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, . . . to help present testimony, and to assist in preparing the cross-examination of a state's psychiatric witnesses, the inaccurate resolution of sanity issues is extremely high." Ake, 105 S. Ct. at 1096.

South Carolina requires court appointment of an independent examiner for indigent prisoners, with the examination at public expense. S.C. Code Ann. § 44-17-530 (Law Co-op. 1985). Illinois permits but does not require the sentencing court to appoint a qualified expert chosen by an indigent prisoner, to be reimbursed by the county. Ill. Ann. Stat. ch. 38 ¶ 104-13(e) (Smith-Hurd 1982).

In Montana, the court may direct that a psychiatrist retained by

the prisoner participate in the mental examination. Mont. Code Ann. § 46-14-202(2) (1983). Idaho guarantees that the prisoner's own expert have reasonable access to the prisoner for examination purposes. Idaho Code § 18-211(8) (1985 Supp.)

In Utah, an alienist who has knowledge of the prisoner's mental condition may be subpoenaed to testify at the competency hearing. Utah Code Ann. § 77-15-5(5). And in Louisiana, "[T]he court order for a mental examination shall not deprive the defendant . . . of the right to an independent mental examination by a physician of his choice. . . ." La. Code Crim. Proc. Ann. art. 646 (West 1981).

The mental examiners should report in writing. Knowing that their findings can be scrutinized by all parties, the public, and when applicable,

the decision-maker and reviewer of the decision, encourages the examiners to report fairly and accurately. Wolff v. McDonnell, 418 U.S. at 565 (1974). Forcing the examiners to articulate their findings further encourages accuracy. Cf. Goldberg, 397 U.S. at 271 ("the decision maker should state the reasons for his determination and indicate the evidence he relied on, [citations omitted] though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.").

Of the 25 states that examine or observe condemned prisoners mentally, 14, not including Florida, require the examiners to report in writing. See Appendix 1, category 4.

Prisoners should also have timely access to examiners' written reports, something that is not always

accorded in Florida. Goode v. Wainwright, 448 So.2d 999 (Fla. 1984) (psychiatric commission's letter to governor opined that condemned prisoner understood nature and purpose of his death sentence; letter was withheld from counsel until after governor signed death warrant; no due process violation found). In a similar situation, this Court invoked due process to protect defendants from being sentenced in capital cases based, at least partly, on information withheld from them and their counsel. Gardner v. Florida, 430 U.S. at 359-62 (1977).

3. An evidentiary hearing must be held to determine sanity, after adequate notice to the condemned prisoner, at which the prisoner may be present, introduce evidence, compel attendance of witnesses, cross-examine adverse witnesses, and obtain a decision with findings of fact on which meaningful judicial review can be based.

Three states, Illinois, Nevada, and South Carolina guarantee prisoners the right to be present at their sanity hearings. Ill. Ann. Stat. ch. 38 ¶ 104-16(c) (Smith-Hurd 1982); Nev. Rev. Stat. § 176.435.1 (1983); S.C. Code Ann. § 44-17-570 (Law Co-op. 1985). See Appendix I, category 6. If one purpose of due process is protecting human dignity, see generally L. Tribe, American Constitutional Law § 10-7 (1978), condemned prisoners must have the option to

be present when their fate is being decided.

Another reason to guarantee the prisoner's presence is related to a major purpose of the historic prohibition on executing the insane: "had the prisoner been of sound memory, he might have alleged something in stay of execution or judgment." 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768). See Nobles v. Georgia, 168 U.S. at 406 (citing Blackstone and other sources).

Nine states^{9/} recognize a connection between a prisoner's unfitness for execution and his inability to assist counsel. By the same reasoning that the prisoner's sanity is a prerequisite to assisting his own defense

^{9/} Supra note 6, at 36.

effectively, the prisoner's presence at the hearing is a prerequisite to assisting his counsel in effectively establishing insanity.

An adversarial evidentiary hearing, held after adequate notice, Wolff v. McDonald, 418 U.S. at 563-64, with participation by both the state and the prisoner through his counsel, must be held to determine the prisoner's sanity. Of the 37 states with statutes or case law applicable to execution of the insane, 12, not including Florida, require some form of adversarial hearings. See Appendix I, category 5.

The prisoner must be guaranteed the right to present evidence. Morrissey v. Brewer, 408 U.S. at 489 (1972). See also Goldberg, 397 U.S. at 267 ("The fundamental requisite of due process is the opportunity to be heard") (quoting

Grannis v. Ordean, 234 U.S. 385, 394 [1914]). The prisoner must also be allowed to cross-examine adverse witnesses. Morrissey, 408 U.S. at 489. See also Goldberg, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

Twelve states allow condemned prisoners to present witnesses or evidence during sanity hearings or examinations. See Appendix I, category 5B. Louisiana, and apparently Ohio and Wyoming permit prisoners to compel attendance of witnesses. La. Code Crim Proc. Ann. art. 647 (1981); Ohio Rev. Code Ann. § 2949.29 (Page 1982) ("Witnesses may be produced and examined. . . .") Wyo. Stat. § 7-13-902 (1985 Supp.) (same wording as Ohio's statute).

In Idaho, Montana, and North Carolina, the prisoner may summon the mental examiners. Idaho Code § 18-212(1) (1985 Supp.); Mont. Code Ann. 46-14-221(1) (1983); N.C. Gen. Stat. § 15-A-1002 (b) (1) (1983). In Utah, the prisoner may subpoena any alienist who has knowledge of his mental condition. Utah Code Ann. § 77-15-5(5) (1982).

Eight states, not including Florida, provide for some form of cross-examination by the prisoner or his counsel. See Appendix I, category 5C. Five of those states limit cross-examination to mental examiners. Id.

Final determinations of sanity vel non (in addition to the written reports of mental examiners, supra at 46-7) must be in writing, indicating the evidence relied on and the reasons for the decision, to provide a basis for

meaningful review. Wolff v. McDonald, 418 U.S. at 564-65.

The procedure to determine if the prisoner has recovered sanity must have as many safeguards as the initial determination of insanity. Procedural protections during the initial determination are of little value if the governor may decide ex parte that the prisoner has regained fitness for execution.

In Wyoming, for example, a jury determines a condemned prisoner's sanity after an inquiry at which witnesses may be examined. Wyo. Stat. § 7-13-901 et seq. (1985 Supp.). But the governor, "as soon as he shall be convinced that the convict has become of sane mind," may schedule the execution. Id. at § 7-13-903.

Fourteen states, including Florida, guarantee as many procedural

protections during subsequent determinations of sanity as during the initial one, nine do not, and 14 are unclear. See Appendix I, category 10.

4. Sanity must be determined and reviewable judicially.

The prisoner's sanity must ultimately be determined by a court or jury.

Some states allow mental examiners or the governor to make final determinations. Mental examiners determine sanity in nine states; the governor does in three states, including Florida. See Appendix I, category 8. In Massachusetts, it is unclear whether the governor and the executive council, two examining psychiatrists, or all of them determine sanity. Mass. Ann. Laws ch. 279, § 62 (Michie/Law Coop. 1984 Supp.).

In the remaining 24 states, courts or juries determine sanity.

Because "the right to an impartial decision-maker is required by due process," Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part), governors should not make final determinations of sanity.

Although their input is vital, mental examiners should also not make final determinations. "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, [and] on the appropriate diagnosis to be attached to given behavior and symptoms. . . . Perhaps because there is often no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary fact-

finders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." Ake, 105 S. Ct. at 1096.

The determination of insanity must not only be judicially determined but appealable as well. Illinois allows determinations of sanity to be appealed. Ill. Ann. Stat. ch. 38 ¶104-16(e) (Smith-Hurd 1982). Mississippi permits the determination of recovery of sanity to be appealed. Miss. Code Ann. § 99-19-57 (2)(a) (1985 Supp.). Twelve states, including Florida, specifically preclude appealing determinations of insanity, and the rest are unclear. See Appendix I, category 9.

Precluding such appeals, however, strips a right of a remedy. Bulger v. People, 61 Colo. 187, 156 P.

800, 806 (Colo. 1916) (Hill and Scott, JJ., dissenting).-

CONCLUSION

For this and the foregoing reasons, amici respectfully request that the judgment of the Eleventh Circuit be reversed and remanded.

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APPENDIX I

1. Is the prisoner, counsel, or next friend guaranteed the right to initiate the process to determine sanity?
2. Must the prisoner be examined mentally or committed before a final determination of sanity is made?
3. May the prisoner appoint or retain his own mental examiner?
4. Must mental examiners report in writing?
5. Must an adversarial hearing held?
- 5A. Is the prisoner guaranteed the right to compel attendance of witnesses?
- 5B. Is the prisoner guaranteed the right to present witnesses or evidence?
- 5C. Is the prisoner guaranteed the right to cross-examine witnesses?
6. Is the prisoner guaranteed the right to be present?
7. Is the prisoner guaranteed the right to counsel during the determination of sanity?

8. Is sanity determined by court (C), jury (J), mental examiner(s) (E), or governor (G)?
9. Is the determination of sanity appealable?
10. Does the procedure to determine recovery of sanity have as many safeguards as the initial determination of insanity?

Y	=	Yes
N	=	No
NA	=	Not Applicable
U	=	Unclear
*	=	State does not have death penalty.
-	=	State does not have applicable statute or case law.

	1	2	3	4	5	SA	SB	SC	6	7	8	9	10
Alabama	N	N	U	NA	N	N	N	N	N	N	C	N	N
Alaska	*	*	*	*	*	*	*	*	*	*	*	*	*
Arizona	N	N	U	NA	N	N	N	N	N	N	J	U	U
Arkansas	N	N	U	N	N	NA	NA	NA	NA	N	E	U	U
California	1	Y	U	NA	N	N	N	N	N	N	J	N	N
Colorado	Y	N	U	N	Y	U	Y	U	U	Y	C	N	Y
Connecticut	N	N	N	Y	N	NA	NA	NA	NA	N	E	U	N
Delaware	N	N	N	Y	N	NA	NA	NA	NA	N	E	U	U
Florida	N	Y	N	N	N	N	N	NA	2	Y	G	N	Y
Georgia	N	N	N	Y	N	NA	NA	NA	NA	N	G	N	N
Hawaii	*	*	*	*	*	*	*	*	*	*	*	*	*
Idaho	N	Y	Y	Y	Y	3	Y	3	2	Y	C	U	Y
Illinois	Y	Y	Y	Y	Y	U	Y	Y	Y	Y	C	Y	Y
Indiana	Y	Y	N	Y	N	NA	NA	NA	NA	Y	E	U	Y
Iowa	*	*	*	*	*	*	*	*	*	*	*	*	*
Kansas	N	Y	N	Y	N	NA	NA	NA	NA	N	E	U	Y
Kentucky	4	N	U	NA	N	NA	NA	NA	NA	N	C	N	U
Louisiana	Y	N	Y	Y	Y	Y	Y	3	2	Y	C	U	Y
Maine	*	*	*	*	*	*	*	*	*	*	*	*	*
Maryland	N	N	N	N	N	NA	NA	NA	NA	N	G	U	Y

	1	2	3	4	5	5A	5B	5C	6	7	8	9	10
Massachusetts	N	Y	N	N	N	N	N	N	N	N	5	U	Y
Michigan	*	*	*	*	*	*	*	*	*	*	*	*	*
Minnesota	*	*	*	*	*	*	*	*	*	*	*	*	*
Mississippi	Y	N	U	NA	N	N	N	N	N	Y	C	U	Y
Missouri	N	Y	N	N	N	N	N	N	N	Y	C	U	N
Montana	Y	Y	Y	Y	Y	3	Y	3	2	Y	C	U	Y
Nebraska	N	Y	N	Y	N	NA	NA	NA	NA	N	E	U	Y
Nevada	N	Y	U	Y	Y	U	Y	Y	Y	Y	C	U	N
New Hampshire	-	-	-	-	-	-	-	-	-	-	-	-	-
New Jersey	-	-	-	-	-	-	-	-	-	-	-	-	-
New Mexico	N	N	U	NA	N	N	N	N	N	N	C	N	N
New York	N	N	N	N	Y	N	Y	U	2	Y	E	N	U
North Carolina	Y	N	U	Y	Y	3	Y	3	U	Y	C	U	U
North Dakota	*	*	*	*	*	*	*	*	*	*	*	*	*
Ohio	N	N	N	NA	Y	Y	Y	Y	N	Y	C _{or} J	U	U
Oklahoma	4	N	U	NA	N	N	N	N	N	Y	J	N	N
Oregon	-	-	-	-	-	-	-	-	-	-	-	-	-
Pennsylvania	N	U	U	U	U	U	U	U	U	U	C	U	U
Rhode Island	N	N	U	N	N	NA	NA	NA	NA	N	C	U	Y
South Carolina	N	Y	Y	Y	Y	N	N	N	Y	Y	C	N	U
South Dakota	N	Y	N	N	Y	N	Y	U	2	Y	E	N	Y

	1	2	3	4	5	SA	SC	SD	6	7	8	9	10
Dessee	N	N	U	U	U	U	U	U	U	U	C	U	U
as	N	U	U	U	U	U	U	U	U	U	C	N	U
h	U	N	Y	Y	Y	6	6	6	2	Y	C	U	U
mont	-	-	-	-	-	-	-	-	-	-	-	-	-
inia	N	Y	U	U	N	NA	NA	NA	U	Y	E	U	U
ington	N	N	U	U	U	N	N	N	N	Y	C	U	U
Virginia	*	*	*	*	*	*	*	*	*	*	*	*	*
onsin	*	*	*	*	*	*	*	*	*	*	*	*	*
ing	N	N	U	NA	U	Y	Y	U	N	N	J	U	N

1. Although a condemned prisoner is not guaranteed the right to initiate the process, it begins automatically 20 days before a scheduled execution.

2. Prisoner's counsel may be present at the hearing. It is unclear whether the prisoner may too.

3. Prisoner may compel attendance of examining psychiatrists, and cross-examine them.

4. Although condemned prisoner is not guaranteed the statutory right to initiate the process, he may do so through habeas corpus proceedings, according to courts.

5. It is unclear who determines sanity: the governor and the executive council, two examining psychiatrists, or, all of them.

6. Alienists who examined prisoner or who otherwise have knowledge of his mental condition may be subpoenaed to testify.

This Appendix differs slightly from the one submitted by amici on petition for writ of certiorari.

APPENDIX II

Of the 41 states that impose capital punishment, 29 give some recognition to the right not to be executed while insane: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, and Wyoming. Three states have done so through case law, Pennsylvania, Texas, and Washington; Louisiana has done so through a combination of case law and statute; the rest have done so through statute.

Four states bar, more generally, punishing or proceeding against insane prisoners: Idaho, North Carolina, and South Carolina by statute, and Tennessee by case law.

Four states provide for the transfer of insane prisoners, whether or not on death row, to mental health facilities: Delaware, Indiana, Rhode Island, and Virginia, all by statute.

Four states have no applicable statute or case law, leaving the common-law prohibition in effect: New Hampshire, New Jersey, Oregon, and Vermont.

A list of the 37 states with statutes or cases applicable to execution of the insane, and their citations, follows:

- Alabama Ala. Code § 15-16-23
(1982). See Magwood v. State, 449 So.2d 1267
(Ala. Crim. App. 1984).
- Arizona Ariz. Rev. Stat. Ann.
13.4021 et seq. (1978).
- Arkansas Ark. Stat. Ann. § 43-2622
(1977). See Leggett v. Henslee, 321 S.W. 2d 764
(Ark. 1959), cert.
denied, 361 U.S. 865
(1959).
- California Cal. Penal Code § 3700
et seq. (West 1986).
See Caritativo v. Cali-
fornia, 357 U.S. 549
(1958); McCracken v.
Teets, 41 Cal.2d 648,
262 P.2d 561 (Cal.
1953); Caritativo v.
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(Cal. 1951); Phyle v.
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208 P.2d 668 (Cal.
1949), cert. denied, 338
U.S. 895 (1949); Williams
v. Duffy, 32 Cal.2d 578,
197 P.2d 341 (Cal.
1948), cert. denied, 335
U.S. 840 (1948).
- Colorado Colo. Rev. Stat. § 16-8-110
et seq. (1978).

Connecticut	Conn. Gen. Stat. Ann. § 54-101. (West 1985 Supp.).
Delaware	Del. Code Ann. title 11, § 406 (1979).
Florida	Fla. Stat. Ann. § 922.07 (West 1983). See <u>Ford</u> <u>v. Wainwright</u> , 752 F.2d 526 (11th Cir. 1985), cert. granted, 106 S.Ct. 566, 88 L.Ed.2d 552 (1985); <u>Goode v. Wainwright</u> , 731 F.2d 1482 (11th Cir. 1984); <u>Ford v. Wainwright</u> , 451 So.2d 471 (Fla. 1984).
Georgia	Ga. Code Ann. 27-2601 <u>et</u> <u>seq.</u> (1983). See <u>Solesbee</u> <u>v. Balkcom</u> , 339 U.S. 9 (1950).
Idaho	Idaho Code § 18-210 <u>et</u> <u>seq.</u> (1985 Supp.).
Illinois	Ill. Ann. Stat. ch. 38 ¶ 1005-2-3 (Smith-Hurd 1982).
Indiana	Ind. Code Ann. § 11-10-4-2 <u>et seq.</u> (Burns 1981).
Kansas	Kan. Stat. Ann. § 22-4006 (1981).
Kentucky	Ky. Rev. Stat. Ann. § 431.240(2) (Baldwin 1978). <u>Davidson v.</u> <u>Commonwealth</u> , 174 Ky. 789, 192 S.W. 846 (Ky. 1917).

Louisiana	La. Code Crim. Proc. Ann. art. 641 <u>et seq.</u> (West 1981). <u>See State</u> <u>v. Miguez</u> , 194 La. 1081, 195 So. 545 (La. 1940).
Maryland	Md. Ann. Code art. 27 § 75(c) (1985 Supp.).
Massachusetts	Mass. Ann. Laws ch. 279, § 62 (Michie/Law Coop. 1984 Supp.).
Mississippi	Miss. Code Ann. § 99-19-57 (1985 Supp.). <u>See</u> <u>Billiot v. Mississippi</u> , No. 54, 960 (Miss. Oct. 30, 1985).
Missouri	Mo. Ann. Stat. § 552.060 (Vernon 1986 Supp.). <u>See Shaw v. State</u> , 686 S.W. 2d 513 (Mo. Ct. App. 1985).
Montana	Mont. Code Ann. § 46-14-103 <u>et seq.</u> (1983).
Nebraska	Neb. Rev. Stat. § 29-2537 <u>et seq.</u> (1979).
Nevada	Nev. Rev. Stat. § 176.425 <u>et seq.</u> (1983).
New Mexico	N.M. Stat. Ann. § 31-14-3 <u>et seq.</u> (1978).
New York	N.Y. Correct. Law § 654 <u>et seq.</u> (McKinney 1984).

North Carolina	N.C. Gen. Stat. § 15-A-1001 <u>et seq.</u> (1983).
Ohio	Ohio Rev. Code Ann. 2949.28 <u>et seq.</u> (Page 1982). <u>See In re Keaton</u> , 19 Ohio App. 2d 254, 250 N.E. 2d 901 (1969), vac'd and rem'd, 408 U.S. 936 (1972).
Oklahoma	Okla. Stat. Title 22 § 1004 <u>et seq.</u> (West 1983). <u>See Bingham v.</u> <u>State</u> , 82 Okla. Crim. 305, 169 P.2d 311 (Okla. Crim. App. 1946); <u>Hays</u> <u>v. Murphy</u> , 663 F.2d 1004 (10th Cir. 1981).
Pennsylvania	<u>Commonwealth v. Moon</u> , 383 Pa. 18, 117 A.2d 96 (Pa. 1955).
Rhode Island	R.I. Gen. Laws § 40.1-5.3-6 (1984).
South Carolina	S.C. Code Ann. § 44-23-210((Law. Co-op. 1985).
South Dakota	S.D. Codified Laws Ann. § 23A-27A-21 (1979).
Tennessee	<u>Jordan v. State</u> , 124 Tenn. 81, 135 S.W. 327 (Tenn. 1911).
Texas	<u>Ex Parte Morris</u> , 96 Tex. Crim. 256, 257 S.W. 894 (Tex. Crim. App. 1924).

Utah	Utah Code Ann. § 77-15-1 <u>et seq.</u> (1982).
Virginia	Va. Code § 19.2-177 <u>et</u> <u>seq.</u> (1983). See <u>Snider</u> <u>v. Peyton</u> , 356 F.2d 626 (4th Cir. 1965).
Washington	<u>State v. Davis</u> , 6 Wash. 2d 696, 108 P.2d 641, 651 (Wash. 1940) (dictum); <u>State ex rel. Alfani v.</u> <u>Superior Court for Grays</u> <u>Harbor County</u> , 139 Wash. 125, 245 P. 929 (Wash. 1926); <u>State v. Nordstrom</u> , 21 Wash. 403, 58 P. 248 (Wash. 1899).
Wyoming	Wyo. Stat. § 7-13-901 <u>et</u> <u>seq.</u> (1985 Supp.).

This Appendix differs slightly from the one submitted by amici on petition for a writ of certiorari.

TABLE COPY

CERTIFICATE OF SERVICE

I, Sanford L. Bohrer, a member of the Bar of this Court, certify that three copies of the foregoing Motion for Leave to File and Brief of the Office of the Capital Collateral Representative et al. as Amici Curiae were served this thirtieth day of January, 1986, by mail, postage prepaid, upon the following counsel:

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JAN 30 1986

JOSEPH F. SPANIOLO, JR.
CLERK

No. 85-5542

(13)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually
and as next friend on behalf of
ALVIN BERNARD FORD,
Petitioner,

v.

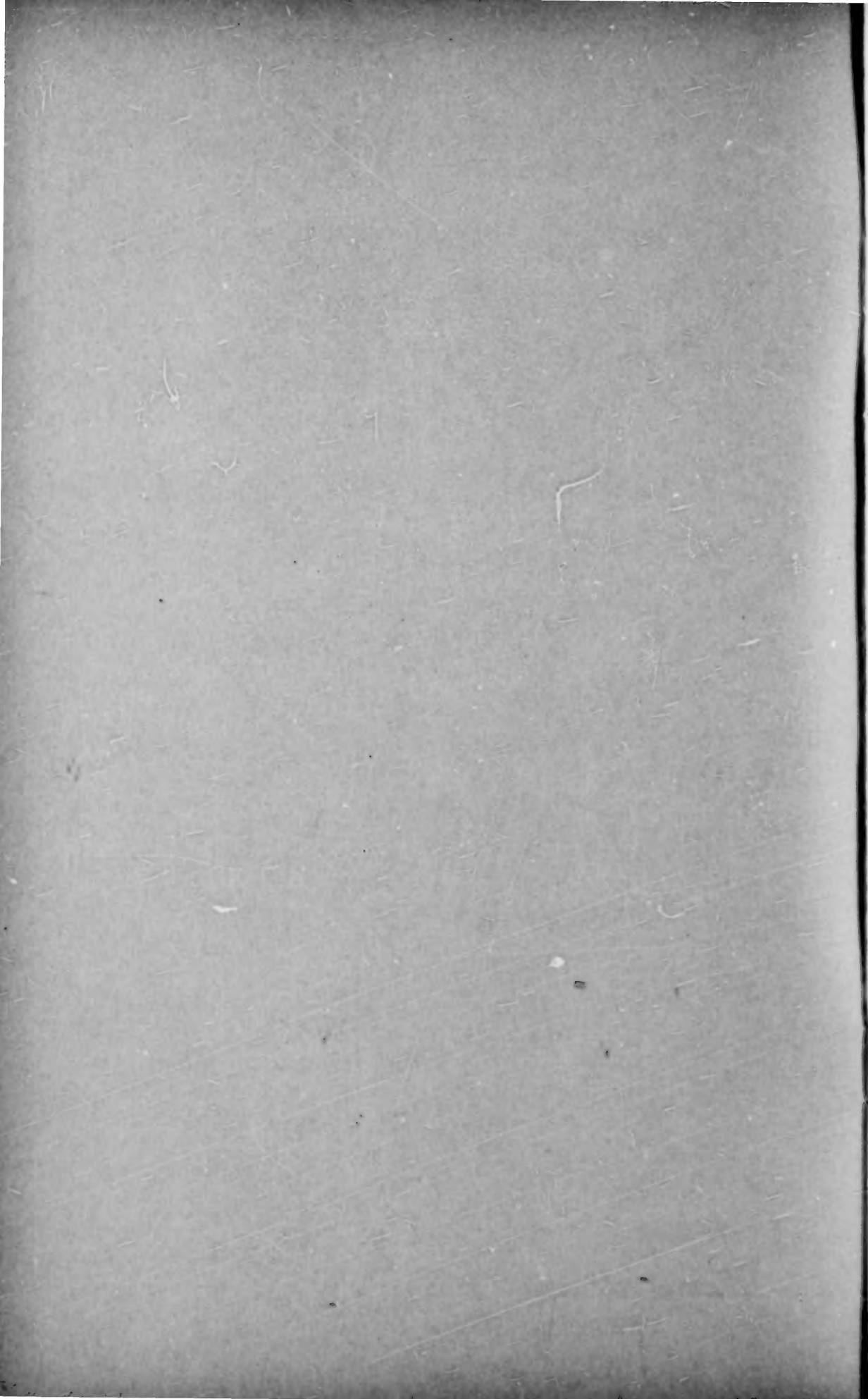
LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE FOR
THE AMERICAN PSYCHIATRIC ASSOCIATION**

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IN THE
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OCTOBER TERM, 1985

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ALVIN BERNARD FORD, or CONNIE FORD, individually
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LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
FOR THE AMERICAN PSYCHIATRIC ASSOCIATION**

The American Psychiatric Association (APA) hereby moves, pursuant to S. Ct. Rules 36 and 42, to file the attached brief amicus curiae in support of the petitioner. Counsel for petitioner has consented to the filing but counsel for respondent has not.

The APA, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Approximately 32,000 of the nation's 40,000

psychiatrists are members. The APA has participated as amicus curiae in numerous cases involving psychiatric issues, including *Allen v. Illinois* (No. 85-5404), *Smith v. Sielaff* (No. 85-5487), *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Mills v. Rogers*, 457 U.S. 291 (1982), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

In recent years the APA has become increasingly involved in examining the role of psychiatric testimony on a variety of legal issues, especially as these issues have arisen with greater frequency in capital punishment cases. The Association believes it is critical that psychiatric contributions be limited to areas of established expertise, *see, e.g., Barefoot v. Estelle, supra*, and that they be subject to procedural safeguards that assure a reasonable measure of professional reliability. *See, e.g., Ake v. Oklahoma, supra; Smith v. Sielaff, supra.*

The instant case involves yet another area of psychiatric inquiry in capital punishment cases—i.e., a death row prisoner's competence to be executed. Whenever such an inquiry is to be made, it is evident that psychiatrists will be called on to provide the principal, if not only, opinions that will form the basis for the ultimate decision. It is thus of considerable concern to the APA and its members that the process by which such decisions are made be fair and reliable so as to protect the integrity of the determination and the role to be played by psychiatric opinions in reaching that determination. The APA further believes that it is especially well-situated to explain the nature of the psychiatric evaluation at issue here, as well as the kinds of procedures that are most likely to help a decisionmaker understand the evaluation process and reach a fair and accurate judgment regarding a prisoner's competence.

For these reasons, the APA requests that its motion to file the attached amicus curiae brief be granted.

Respectfully submitted,

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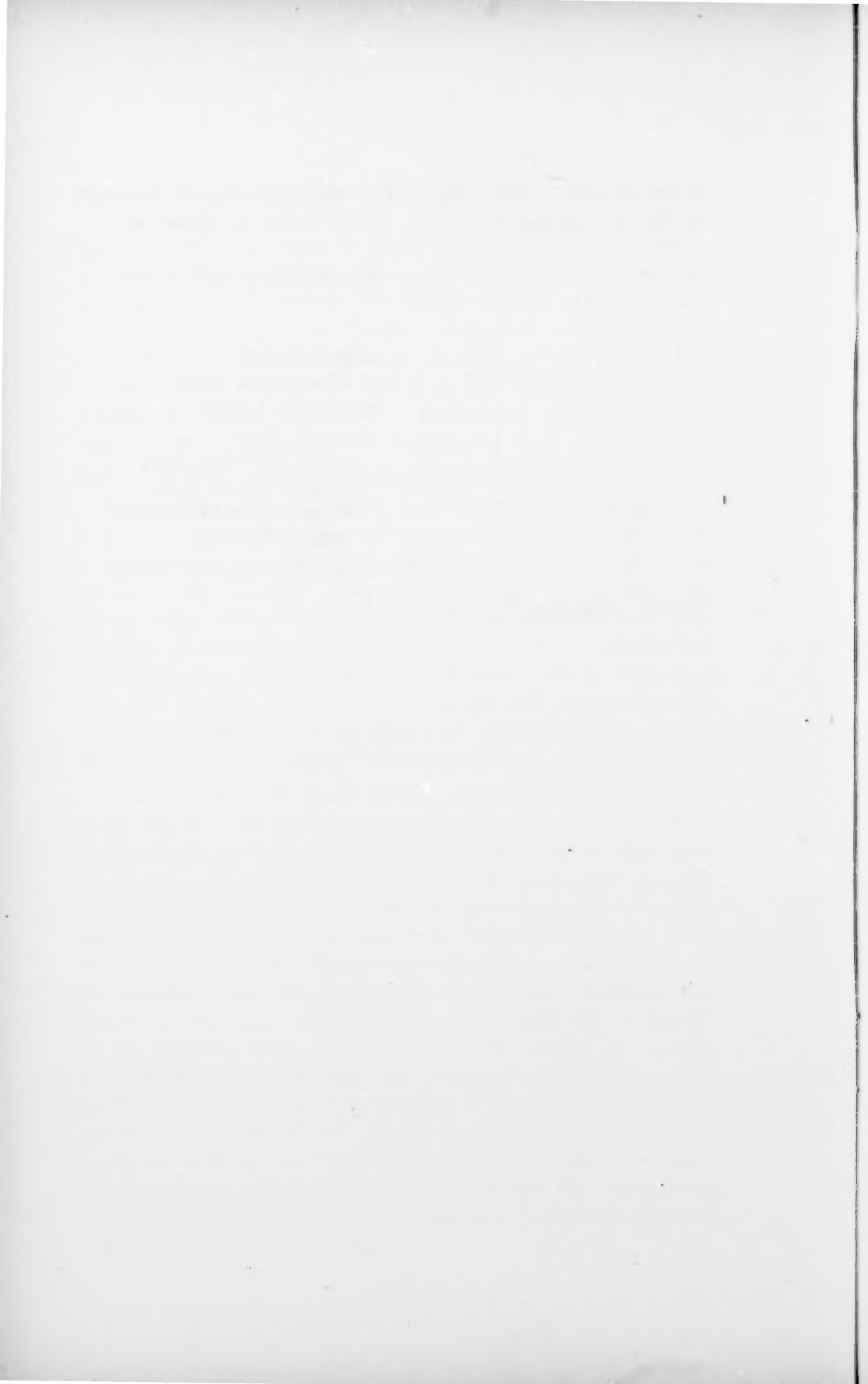


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THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF

THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard

1679

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**BRIEF AMICUS CURIAE FOR THE
AMERICAN PSYCHIATRIC ASSOCIATION**

INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears from the foregoing motion.

STATEMENT

Petitioner Alvin Ford was convicted of first degree murder for the July 21, 1974 shooting of a police officer, and was sentenced to death. During the time that he pursued a variety of appeals and post-conviction remedies, Ford remained confined on Florida's death row. While

his mental state was never an issue in any of the proceedings resulting in his conviction and sentence, he began to manifest bizarre symptoms in late 1981. At first, he claimed that he was aware of the activities of the Ku Klux Klan outside the prison and that he could communicate this knowledge telepathically to the news media. He also believed that, in retaliation, the Klan had seized members of his family and was torturing them in an area near his cell.

Throughout 1982 and 1983 Mr. Ford's condition appeared to deteriorate: he claimed to have joined the Ku Klux Klan, freed the hostages held by the Klan, and appointed new justices to the Florida Supreme Court. By October of 1983, Ford believed that he was free to leave death row because the justices whom he had appointed to the Court, in a case he termed "*Ford v. State*," had overturned the statute under which he was sentenced. As Mr. Ford's delusions became more pervasive, his ability to communicate also apparently deteriorated and he often spoke incoherently.

Under Florida law, if a prisoner is not competent at the time of his execution—i.e., if he is unable to understand either "the nature and effect of the death penalty," or "why it is to be imposed upon him"—the imposition of his death sentence must be delayed until his competence is restored. Fla. Stat. § 922.07 (1983). In view of this provision, and concerned about his client's mental condition, Ford's counsel requested two psychiatrists to evaluate him. These psychiatrists each examined Ford on several different occasions and also reviewed the available medical records and other pertinent information.¹ Both doctors diagnosed Ford as suffering from

¹ Dr. Amin conducted four separate interviews with Ford between July 1981 and August 1982. He also reviewed his prison psychiatric and medical records and his correspondence, and talked with Ford's relatives, attorneys, other inmates and prison personnel. Joint Appendix (J.A.) 87. After August of 1982 Ford refused to

paranoid schizophrenia.² Dr. Kaufman further concluded that, as a result of his illness, Ford was incompetent under the Florida standards. J.A. 108.

Ford's counsel also initiated the review procedures provided for in the Florida statute governing competence to be executed. Pursuant to that statute, Governor Graham—who ultimately is responsible for making the decision on competence—appointed a commission of three psychiatrists to examine Ford.³ Doctors Ivory, Mhatre, and Afield jointly examined him on December 19, 1983, for a total of approximately thirty minutes in a courtroom at the Florida State Prison with about eight people present, including lawyers for Ford and the Governor, and correctional officials. In addition, the psychiatrists visited Mr. Ford's cell, discussed his condition with the correctional and medical staff, and reviewed his prison medical

see Dr. Amin, claiming that he was part of the conspiracy, along with the Ku Klux Klan, to persecute him. Dr. Kaufman was then retained by Ford's counsel. He examined Ford at length on November 3, 1983, and May 23, 1984, and also relied on information provided by Dr. Amin.

² On the basis of his first interview, Dr. Kaufman diagnosed Ford as schizophrenic, undifferentiated type. J.A. 96. After a second interview, Kaufman concluded that Ford was a paranoid schizophrenic. *Id.* at 108.

³ Section 922.07(1) of the statute provides:

When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

records. Defense counsel also provided to each examiner a psychiatric profile of Mr. Ford prepared at the time of his trial in 1974, samples of his correspondence during 1982-1983, and reports of the evaluations conducted by the two psychiatrists whom counsel had independently retained.

Each of the three psychiatrists appointed by the Governor submitted a written report to him. While Dr. Ivory concluded that Ford was malingering, Doctors Mhatre and Afield found that he was suffering from a psychosis. All three psychiatrists nevertheless agreed that Ford was competent for purposes of execution.⁴ In response to these reports, Ford's counsel filed a written submission with the Governor, which included the reports of the two other psychiatrists who had examined Ford. The Governor's office refused to inform counsel whether his submission would be considered. *See* Tr. May 29, 1984 Hearing at 15-16. The Governor's public position was to "exclud[e] all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode v. Wainwright*, 448 So.2d 999, 1001 (Fla. 1984).

On April 30, 1984, Governor Graham, concluding that Ford was competent, issued a death warrant. Ford's mother, as next friend, then filed a motion in state court requesting a stay of execution along with a hearing and the appointment of experts to determine Ford's competence for execution. The request was denied and an appeal was taken to the Florida Supreme Court, which also denied relief. *Ford v. Wainwright*, 451 So.2d 471 (Fla. 1984). Thereafter, a petition for habeas corpus was filed in the United States District Court for the Southern District of Florida, asserting a constitutional

⁴ Dr. Mhatre indicated, however, that Ford "is in need of appropriate antipsychotic medication, [and that] without such treatment he is likely to deteriorate further and may soon reach a point where he may not be competent for execution." J.A. 103-104.

right to be competent at the time of execution and an accompanying entitlement to an evidentiary hearing on the issue of competence. The petition was denied without a hearing.

On appeal, the Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and stayed Mr. Ford's execution. *Ford v. Strickland*, 734 F.2d 538 (11th Cir.), *aff'd*, 104 S.Ct. 3498 (1984). A divided panel of that court, however, ultimately affirmed the district court's denial of the habeas petition. Rejecting Ford's claim "that the prohibition against execution because of insanity is rooted in the eighth amendment," the court noted that "[n]o federal appellate court has so held." *Ford v. Wainwright*, 752 F.2d 526, 527 (11th Cir. 1985). The Eleventh Circuit also turned down Ford's procedural due process challenge to the Florida statute on the ground that *Solesbee v. Balkcom*, 339 U.S. 9 (1950), which had rejected the same argument concerning a virtually identical Georgia statute, was controlling in this case. Judge Clark dissented. He believed that developments in Eighth Amendment doctrine since *Solesbee* precluded execution of the insane, and that the "Florida procedure [is] totally lacking in due process protection. There is no room for advocacy, no written findings, and no judicial review." *Ford v. Wainwright*, *supra*, 752 F.2d at 533 (footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question of whether there is a right not to be executed unless competent raises difficult legal and moral problems.⁶ The solution to these problems, however, is

⁶ The source of any constitutional protection in this regard would either be the Eighth Amendment's prohibition on cruel and unusual punishment or the Fourteenth Amendment's more general recognition of certain liberty interests. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972). Depending on the source, the protection might be characterized as a "prohibition" on the state or as a "right" of the individual. For convenience, we use the term "right" throughout this brief.

not to recognize the right in principle and then to denigrate its significance by subjecting it to the most cursory form of procedural review. In Florida, three psychiatrists briefly and collectively examine the prisoner and prepare conclusory written reports for the Governor who, on this basis, decides the prisoner's competence. Whatever else might be said, we are confident that such an approach undermines the fairness and validity of the determination by effectively relegating this important and highly visible legal question to pre-selected psychiatrists whose evaluations are conducted in a hurried fashion and whose views may be neither challenged nor explored.

In view of these concerns, the APA will here address the procedures necessary for an adequate psychiatric examination and ultimate determination of competence to be executed. We take no position on the underlying questions of whether there should be a right not to be executed while incompetent and, if so, what the standard of competence should be for this purpose: resolution of those matters turns on considerations as to which the Association possesses no special expertise.⁶ If there is to be such a determination, however, we think the Flor-

⁶ We recognize, of course, that the existence of such a right inevitably will lead to certain problems directly affecting psychiatrists. If a prisoner cannot be executed unless competent, the responsibility for treating mentally incompetent prisoners will fall on psychiatrists, who may then have to resolve difficult ethical issues concerning the provision of treatment that may result in the imposition of a death penalty. Cf. APA, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, Section 1, Annotation 7 (1985) (prohibiting psychiatrists from participating in legally authorized executions). Moreover, there will also be troubling legal issues about a prisoner's right to refuse treatment in these circumstances (presumably under some theory of "best interests" or "substituted judgment").

We should note in this regard that, irrespective of whether the right has a constitutional basis, these issues will arise in states like Florida and the many others that currently do not allow prisoners found incompetent to be executed.

ida procedures for deciding a matter of this importance are deficient in three critical respects.

1. The psychiatric evaluation process itself is flawed in design. By tolerating quick, group evaluations by the state-appointed psychiatrists, the Florida procedures do not allow for the kind of careful and comprehensive examination that is necessary to reach reliable professional opinions on the issue of competence. Although this Court has previously declined to impose substantive limitations on the methods used for arriving at expert psychiatric opinions, *see Barefoot v. Estelle*, 463 U.S. 880, (1983), the legal inquiry into competence at issue here is sufficiently different to warrant the opposite conclusion. In the present context, inadequate evaluations seriously compromise the reliability of the process from its inception and, therefore, violate due process.

2. The failure to allow consideration of the reports and opinions of psychiatric experts retained by the prisoner violates basic principles of fairness. Indeed, "the fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). By eliminating this protection, Florida denies the decisionmaker potentially important probative information on a matter that is often subject to reasonable professional disagreement.

3. The absence of cross-examination also amounts to a denial of due process in the circumstances presented here. The determination of a prisoner's competence depends not only on a medical diagnosis, but also on the ability to relate that diagnosis to the governing legal standard. A psychiatrist who renders an opinion on a matter as controversial as a prisoner's competence to be executed should be subject to cross-examination to determine how he reached his opinion, what information might have led him to a different conclusion, and the level of confidence with which he holds that opinion. *See, e.g., Barefoot v. Estelle, supra; Ake v. Oklahoma*, 105 S.Ct. 1087 (1985).

ARGUMENT

I. THE FLORIDA PROCEDURES FOR DETERMINING COMPETENCE TO BE EXECUTED ARE CONSTITUTIONALLY FLAWED BECAUSE THEY DO NOT PROVIDE FOR PROFESSIONALLY ADEQUATE PSYCHIATRIC EVALUATIONS AND PROPER PROCEDURES FOR ASSURING RELIABLE DECISIONS.

The touchstone of any due process inquiry is the need to assure reliability. This Court has been particularly demanding when assessing procedures that culminate in execution. It has consistently required that states develop procedures that minimize the risk of error. *See Zant v. Stephens*, 462 U.S. 862, 884-85 (1983); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion). "From the point of view of the defendant, [capital punishment] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion).

To be sure, the issue here is somewhat different since the propriety of a death sentence is no longer in question. Rather, the issue is whether the state may impose a sentence that has, by definition, finally been determined to be valid. That question—assuming there is a right not to be executed unless competent—nevertheless depends on a factual finding, the significance of which is obvious: it may delay indefinitely the imposition of the death penalty. Such an effect, we believe, is plainly of sufficient consequence to warrant procedures that will ensure reliable factual determinations on the issue of competence.

Although this Court has made clear that specific procedural requirements may vary depending on the competing interests affected by a given determination, *see, e.g.*,

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), it is inconceivable that a determination having consequences as serious as those at stake here could be made with sufficient reliability through the cursory review process employed in Florida. Indeed, even when matters of considerable less gravity are at stake, the Due Process Clause uniformly has been held to require at least an administrative process governed by the basic procedures that characterize the adversary process. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970) (welfare benefits); *Morrissey v. Brewer*, *supra*, 408 U.S. at 487-89 (parole revocation); *Vitek v. Jones*, 445 U.S. 480, 494-97 (1980) (transfer from prison to mental hospital).⁷

Measured against these established standards, we think the Florida procedures for determining competence to be executed are constitutionally deficient in three specific respects: (1) they fail to provide for adequate evaluations by the state-appointed psychiatrists; (2) they prohibit consideration of probative evidence based on the opinions of experts retained by the prisoner; and (3) they fail to allow for cross-examination of all psychiatrists who proffer an opinion on the issue of competence to be executed.⁸

A. The Psychiatric Evaluation Process Used To Assess Competence To Be Executed Is Inadequate To Assure Professionally Reliable Opinions.

The statutory procedure in Florida provides that the Governor shall "appoint a commission of three psychiatrists to examine the convicted person." Fla. Stat. § 922.07(1)

⁷ In the latter two cases, the Court held that certain procedural rights could be denied in a particular case for good cause. *Morrissey v. Brewer*, *supra*, 408 U.S. at 489; *Vitek v. Jones*, *supra*, 445 at 494-95.

⁸ We also wish to note our preference for a judicial determination of the issue because of the especially controversial nature of the death penalty and its ultimate imposition. In any event, we question whether a politically elected official like the Governor is the proper person to make this decision.

(1983). These psychiatrists are required to conduct their interview at "the same time," and "[c]ounsel for the convicted person and the state attorney may be present at the examination." *Ibid.* In the instant case, the state-appointed psychiatrists interviewed the prisoner once for approximately thirty minutes, reviewed his prison medical records, checked his cell and spoke to prison personnel. During the interview itself, in addition to counsel for the parties, correctional officials were present. These procedures, both on their face and as applied, are insufficient to assure reliable psychiatric opinions on the issue of competence.

To begin with, the hurried nature of the process means that traditional evaluative techniques which are often essential to an adequate examination simply are not used. In many instances, for example, it is necessary to conduct more than one clinical interview. See S. Halleck, *Law in the Practice of Psychiatry: A Handbook for Clinicians* 201 (1980) ("[m]ost patients . . . should be interviewed for several hours"). Thus, researchers who have studied death row inmates have uniformly relied on repeated interviews to reach valid psychiatric diagnoses. See e.g., Bluestone & McGahee, *Reaction To Extreme Stress: Impending Death By Execution*, 119 *Amer. J. Psychiat.* 393 (1962); Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 *Amer. J. Psychiat.* 81 (1972). Similarly, a comprehensive examination may also require "a physical examination, neurologic examination, neuropsychological testing, EEG, CT scan, or skull films." APA, *The Role of Psychiatry in the Sentencing Process* 18 (1984). But the time needed to perform these procedures is not available when the press to carry out a scheduled execution takes priority.

The use of a group interview, moreover, with the presence of correctional officials and state attorneys, let alone the prisoner's attorneys, may often undermine the opportunity for an effective interview. See *Estelle v. Smith*, 451

U.S. 454, 470 n.14 (1981), quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979) ("an attorney present during the psychiatric interview . . . might seriously disrupt the examination"). As Dr. Seymour Halleck explained in an affidavit provided to Ford's counsel, "[i]n the setting described it would have been extremely difficult for Mr. Ford to fully reveal his problems or the nature of his illness. The thirty minute effort to establish communications under the conditions already noted was also inadequate." J.A. 112.

The effects of this inadequate examination process can readily be seen in the present case. The question of malingering, raised by two of the state-appointed psychiatrists,⁹ is obviously a real concern in this context. For precisely this reason, it may also be highly prejudicial even if suggested by only one examiner. Thus, when the question arises, there should be a special effort to evaluate it carefully. There are various established approaches, including psychological and organic testing, that can strongly, if not conclusively, support a reliable answer. See Resnick, *Detection of Malingered Mental Illness*, 2 Behavioral Science and the Law 21 (1984). Those approaches were not used here, however.

The inadequacy of the evaluation process can also be seen by comparing the diagnoses reached by the various psychiatrists. Two of the state-appointed psychiatrists concluded that Ford was suffering from a psychosis,¹⁰

⁹ Dr. Ivory's report stated that Ford "knows exactly what is going on," and that "[t]his inmate's disorder, although severe, seems contrived and recently learned." J.A. 98, 100. Dr. Afield stated that Ford's "disorganization is somewhat 'put on.'" *Id.* at 105. He nevertheless concluded that "the profoundness of [Ford's disorganization] forces me to put a 'psychotic' label on the inmate." *Ibid.*

¹⁰ According to Dr. Mhatre, Ford was suffering from "psychosis with paranoia." J.A. 103. Since that is not a recognized diagnosis, it is not clear whether Dr. Mhatre considered Ford to be suffering from paranoid schizophrenia or, more generally, psychosis. After

which is a non-specific classification that includes various types of schizophrenias, affective disorders and organic brain disorders. See APA, *Diagnostic and Statistical Manual of Mental Disorders* 368 (3d ed. 1983).¹¹ To make such a diagnosis, a psychiatrist must determine that "there are psychotic symptoms (delusions, hallucinations, incoherence, loosening of association, markedly illogical thinking, or behavior that is grossly disorganized or catatonic) that do not meet the criteria for any [more] specific mental disorder." *Id.* at 202-03. The non-specific diagnosis of psychosis thus reflects one of two possibilities: either the psychiatric examination permitted consideration and rejection of other more specific mental disorders or, more likely, the psychiatrist possessed insufficient information to make a more specific diagnosis.

The diagnosis of paranoid schizophrenia made by the psychiatrists retained by Ford's counsel, while consistent with the general diagnosis of psychosis, requires that a person also be found to have at least a six-month history of either persecutory delusions, grandiose delusions, delusional jealousy, or hallucinations with persecutory or grandiose content. *Id.* at 191. The ability of these psychiatrists to make this more discriminating diagnosis tends to suggest that they were able to elicit substantially more information in their extended evaluations of Mr. Ford than was elicited by the state-appointed psychiatrists. It also suggests that the examinations by the state-appointed psychiatrists were simply insufficient to fully evaluate him.

When an expert evaluation process leads to such unsatisfying results in an area where so much is at stake, we

his initial description, Dr. Mhatre later says only that "Ford is suffering from psychosis." *Ibid.*

¹¹ The *Diagnostic and Statistical Manual of Mental Disorders*, which is currently in its third edition and is often referred to as DSM-III, is the basic psychiatric diagnostic manual of the medical profession.

think it is appropriate to insist that the process itself be invalidated. This case is significantly different from *Barefoot v. Estelle*, *supra*, 463 U.S. at 901-04, where the Court rejected a claim that the use of hypothetical questions as a basis for forming a psychiatric opinion in capital cases violated due process. The issue here is a prisoner's mental state which, in contrast to the question of future dangerousness presented in *Barefoot*, can only be based on a mental examination.¹² If those mental examinations do not meet basic professional standards relating to the conditions under which the examination is performed and the time available for thorough evaluation and the use of adjunctive procedures, it is difficult to see how a legal determination that turns largely, if not exclusively, on such examinations can claim to be reliable in any meaningful way.

B. The Failure To Allow For Consideration Of Opinions By Psychiatrists Retained By The Prisoner Denies Fundamental Fairness.

It is well-established that "the fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, *supra*, 234 U.S. at 394. See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Despite this recognition, the Florida procedures restrict expert opinions to those psychiatrists appointed by the Governor. In our view, this restriction needlessly eliminates potentially important evidence. When the consequences attaching to the decision in question are as important as they are here, due process requires that all relevant opinions at least be considered.

This conclusion is fully consonant with basic principles repeatedly recognized by this Court. Thus, the Court has

¹² In contrast to an assessment of competence, a prediction of future dangerousness depends much more on a person's past behavior and much less on a consideration of his current mental condition. See J. Monahan, *The Clinicial Prediction of Violent Behavior* (1981).

emphasized that in imposing a sentence of death, it is "essential" that the factfinder "have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion). Accord *Barefoot v. Estelle*, *supra*, 463 U.S. at 897-99; *Zant v. Stephens*, *supra*, 462 U.S. 886-87; *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

In addition, only last Term the Court held that when a defendant's mental condition is a "significant factor" in the legal issue to be resolved, he is entitled to psychiatric assistance to help present his case. *Ake v. Oklahoma*, *supra*, 105 S. Ct. at 1097. As the Court explained, when this condition is satisfied, "the factfinder would have before it both the views of the prosecutor's psychiatrist and the opposing views of the defendant's doctors and would therefore be competent to 'uncover, recognize, and take due account of . . . shortcomings.'" *Ibid.*, quoting *Barefoot v. Estelle*, *supra*, 463 U.S. at 899. In view of this recognition, *Ake* went so far as to require that the state pay for the necessary psychiatric assistance for a defendant. It is implausible to suggest, therefore, that a state could have an interest sufficient to justify a blanket exclusion of psychiatric opinions based on evaluations commissioned by the prisoner which cost the state nothing.¹³

Once again, the potential prejudice from excluding these opinions is evident. Ford was examined by five psychiatrists. Of these, only the two retained by Ford's counsel met with him more than once or conducted lengthy and private interviews. These two psychiatrists indicated that Ford was suffering from the specific dis-

¹³ Even in circumstances such as competency to stand trial, where the court may appoint a psychiatric expert to conduct an evaluation, see, e.g. Fla. Stat. § 916.11 (1983), we are aware of no procedure that would prevent the subject of such an examination from submitting the results of evaluations conducted on his behalf.

order of paranoid schizophrenia, J.A. 91, 108, and the one of the two who expressed an opinion on Ford's competence concluded that he was incompetent under the Florida standards. *Id.* at 108.¹⁴ Two state-appointed psychiatrists, who reviewed the findings of the psychiatrists retained on Mr. Ford's behalf, also concluded that he was suffering from a severe mental disorder, but found him competent. *Id.* at 103, 105-06. The third, who relied solely on the group interview and information obtained at the prison, believed Ford was malingering. *Id.* at 98-100.

In view of the range of psychiatric opinion, the decision to exclude the evidence collected on behalf of Mr. Ford was plainly indefensible. It denied to the Governor the opinions, based upon the most extensive clinical foundation, corroborating the finding of two of the three state-appointed psychiatrists that Mr. Ford suffered from a severe mental disorder. Moreover, it excluded the opinion, and the data and analysis supporting that opinion, of the one psychiatrist who concluded that Ford was incompetent. While the result of the Florida procedure was the submission to the Governor of a unanimous finding of competence, that unanimity was bought here at too high a price. Even if all the reports had been considered, of course, the decision may have been the same. But it is one thing to reach a conclusion after at least weighing all relevant evidence. It is an entirely different matter to ignore probative information altogether.

C. The Failure To Allow For Cross-Examination Of Experts Who Render Opinions Concerning Competence To Be Executed Violates Due Process.

While not as fundamentally important as the rights to a professionally adequate examination by state-appointed psychiatrists and to present one's own psychia-

¹⁴ The other psychiatrist, Dr. Amin, was not asked to render an opinion on Ford's competence.

tric evaluations, the opportunity to cross-examine psychiatric witnesses is nevertheless sufficiently important to warrant its constitutional necessity in the present circumstances. Cross-examination is generally recognized as a basic safeguard for assuring reliable factual determinations. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 63-64, 72 (1980); *Goldberg v. Kelly*, *supra*, 397 U.S. at 269-70; *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969). There is nothing so different about a process that relies on expert opinion to establish competence for execution that would warrant disposing of this protection here.

Two factors, in particular, lead us to this conclusion. First, the legal issue in question requires not only an assessment of the prisoner's mental condition but also a determination of "whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." Fla. Stat. § 922.07(1) (1983). Thus, whether or not a psychiatrist is willing to render an opinion in the precise terms of the legal standard,¹⁵ he nevertheless must perform the additional analytic step of relating a medical diagnosis to the prisoner's ability to understand the matters in question. In the absence of cross-examination, it is difficult for the factfinder to determine what it is about a person's mental condition

¹⁵ There is considerable professional dispute about the propriety of testifying in terms of ultimate legal issues. The APA has previously taken the position that such testimony should be avoided since it tends to usurp the role of the factfinder by confusing psychiatric with moral or legal questions. See APA, *Statement on the Insanity Defense* 13-14 (1982). In the instant case, for example, the critical term in the standard for competence used in Florida is the word "understands," a word that is not defined in the statute. The ultimate decision, therefore, depends on a judgment of just what level of understanding or lack thereof is sufficient to find someone incompetent. That is a legal, not a psychiatric, determination. Psychiatric testimony can certainly illuminate the effect of a person's mental disorder on his ability to understand certain matters. But no psychiatric expertise is involved in determining whether a person's understanding is *sufficiently* impaired to render him legally incompetent.

that affects his ability to understand, how and to what extent that ability is impaired, and whether the impairment is temporary, transitory or permanent.

In addition, there is a special reason for requiring cross-examination here. Because the death penalty arouses strong personal feelings, there is an increased risk that without cross-examination the resolution of competence may be colored by personal opinions regarding capital punishment. The effect may be felt subtly, through the refusal of many well-qualified psychiatrists to participate in a procedure whose reliability and fairness they question. Or it may be more overt, with personal bias influencing an expert opinion, especially when it includes the adaptation of a medical diagnosis to a legal standard. See note 15 *supra*. See also *Barefoot v. Estelle, supra*, 463 U.S. at 899-901. Whatever its complexion, such influence further undercuts the reliability of a process that lacks adequate safeguards.

While it is always difficult to speculate on the effect of not allowing cross-examination, it would appear that its absence in this case was potentially significant. The inadequacy of the examination process used by the state-appointed psychiatrists was certainly a matter that could have been explored and then contrasted with the much more extensive evaluation done by the psychiatrists retained by defense counsel. In addition, several of the critical conclusions in the written reports of the state-appointed psychiatrists merited extended consideration. Dr. Mhatre, for example, stated that, while "Ford is suffering from psychosis at the present time, he has *enough* cognitive functioning to understand the nature and effects of the death penalty, and why it is to be imposed upon him." J.A. 103 (emphasis supplied). What exactly the doctor meant by "enough" is the kind of question that requires careful exploration as to where psychiatric expertise leaves off and legal or moral judgments begin. And Dr. Ivory, while forming the opinions

that Ford knew "exactly what [was] going on and . . . that he [was] in touch with reality," *id.* at 98, nevertheless recommended "that a medical review to look into the feasibility of psychotropic medication might be helpful." *Id.* at 100-01. These views are at least facially inconsistent and would have benefitted from further questioning.

In sum, in the circumstances presented, the absence of cross-examination sufficiently undercuts the overall reliability of the process to violate due process.¹⁶

¹⁶ Notwithstanding our conclusions regarding these various due process protections, we believe that there is one situation where the state's interest in carrying out a death sentence in a timely fashion justifies a different approach. The inquiry called for in a competence to be executed determination differs in a critical respect from other legal inquiries into mental state: Because the standard is based upon the convicted person's competence at the time the sentence is to be carried out, it requires the factfinder to make an essentially prospective determination of competence. This consideration raises at least the possibility of repeated claims of incompetence based upon assertions that the convicted person's mental condition has deteriorated following an initial determination of competence. While the state thus has an interest in addressing repeated claims in a rapid fashion, its ability to do so adequately is directly related to the quality of the initial factfinding. A proceeding conducted in accordance with reasonable due process protections is far more likely to permit the factfinder to make an accurate determination of the likelihood that a person might deteriorate materially in the immediate future, as well as of his current mental state. The information generated in such a proceeding, moreover, should often provide a sufficient clinical background to allow subsequent assessments of competence to be addressed reliably through less formal procedures.

CONCLUSION

For the foregoing reasons, the Court should rule that, if there is a right not to be executed while incompetent, the constitutional guarantee of due process requires adequate psychiatric evaluations and the opportunity for a prisoner to be heard and to cross-examine adverse witnesses.

Respectfully submitted,

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